TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 263.

L. V. MULLEN, PLAINTIFF IN ERROR,

vs.

N. H. SIMMONS, SHERIFF OF JOHNSTON COUNTY, OKLAHOMA, ET AL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

FILED MAY 28, 1912.

(23,223)

(23,223)

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a *Return to Writ.*

UNITED STATES OF AMERICA,
Supreme Court of Oklahoma, ss:

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, together with all things concerning the same.

In witness whereof, I hereunto subscribe my name, and affix the seal of the said Supreme Court of Oklahoma, in Oklahoma City, this 21st day of May, 1912.

[Seal Supreme Court, State of Oklahoma.]

W. H. L. CAMPBELL,
Clerk of the Supreme Court of the State of Oklahoma.
By JESSIE PARDOE, *Deputy.*

1 UNITED STATES OF AMERICA, *ss:*

To N. H. Simmons, Sheriff of Johnston County, Oklahoma, Lillord F. Ham, Ellen Ham, Dink D. Ham and E. F. Ham for herself and as the next friend of May Ham; and Sherman T. Ham, Maud Ham and Roy H. Ham, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the Clerk's office of the Supreme Court of the State of Oklahoma, wherein L. V. Mullen is plaintiff in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice *should not be corrected, and why speedy justice* should not be done to the parties in that behalf.

Witness, the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, this first day of May, in the year of our Lord one thousand nine hundred and twelve.

JOHN B. TURNER,
Chief Justice of the Supreme Court of Oklahoma.

ARDMORE, OKLAHOMA, *May* 3, 1912.

I, L. S. Dolman, attorney of record for the defendants in error in the above entitled case, to whom the citation in error above is directed, hereby acknowledge due service of the above citation for and on behalf of each of said defendants in error.

L. S. DOLMAN,
Attorney of Record for Defendants in Error.

2 In the Supreme Court of the State of Oklahoma.

[Endorsed:] 1535. Filed May 6, 1912. W. H. L. Campbell, Clerk.

No. 1535.

N. H. SIMMONS et al., Plaintiffs in Error,
vs.
L. V. MULLEN, Defendant in Error.

L. V. Mullen, defendant in error in the above entitled cause considering himself aggrieved by the final decision of the Supreme Court of the State of Oklahoma in reversing the judgment of the trial court, and in rendering judgment against him in the above entitled cause, prays a writ of error from said decision and judgment to the Supreme Court of the United States and asks that an order be made fixing the amount of a supersedeas bond to stay proceedings in the trial court pending the review of this cause on writ of error to the Supreme Court of the United States.

S. T. BLEDSOE,
Attorney for Defendant in Error L. V. Mullen.

Writ of Error allowed as prayed for and supersedeas bond fixed at the sum of $1,000.00 to operate as supersedeas to further proceedings pending the appeal.

JOHN B. TURNER,
Chief Justice Supreme Court, State of Oklahoma.

Attest:
W. H. L. CAMPBELL, *Clerk.*
By JESSIE PARDOE, *Deputy.*

Filed May 1, 1912. W. H. L. Campbell, Clerk.

3 [Endorsed:] No. 1535. In the Supreme Court of the State of Oklahoma. N. H. Simmons, et al., Plaintiffs in Error, vs. L. V. Mullen, Defendant in Error. Filed May 1, 1912. W. H. L. Campbell, Clerk.

4 In the Supreme Court of the State of Oklahoma.

No. 1535.

N. H. SIMMONS et al., Plaintiff in Error.
vs.
L. V. MULLEN, Defendant in Error.

Assignments of Error.

In Error from the Supreme Court of the State of Oklahoma, to the Supreme Court of the United States.

L. V. Mullen, defendant in error in the above entitled cause, by his Attorney, S. T. Bledsoe, respectfully asserts that in the judgment and opinion of the Supreme Court of the State of Oklahoma in the above entitled cause, manifest error has occurred to his prejudice in the following particulars, to-wit:

I.

That the Supreme Court of the State of Oklahoma erred in reversing the judgment of the trial court and in rendering
5 the same in favor of the plaintiffs in error.

II.

That the Supreme Court of the State of Oklahoma erred in holding that the answer and other pleadings of the plaintiffs in error, the defendants in the trial court, constituted a defense in the cause of action of the defendant in error in the Supreme Court of the State, the plaintiff in the trial court.

III.

That the Supreme Court of the State of Oklahoma erred in holding that lands allotted to members of the Choctaw or Chickasaw Tribes of Indians, under the Act of Congress approved July 1, 1902, entitled An Act To Ratify an Agreement with the Choctaw and Chickasaw Tribes of Indians and for other purposes 32 Statute 641; were subject to seizure and involuntary sale on execution to satisfy a judgment for tort rendered against the allottee January 31, 1901, and prior to the allottment of said lands.

IV.

That the Supreme Court of the State of Oklahoma erred in holding that the answer of Simmons, plaintiff in error in this court and defendant in the trial court, stated such facts as would entitle him to seize and sell the lands under the pretended execution directed to him.

V.

That the Supreme Court of the State of Oklahoma erred in holding that the interplea of Lillard F. Ham, et al., filed in the District Court of Carter County, Oklahoma, set forth such a judgment as would support the seizure and sale upon execution of the lands here involved.

VI.

That the Supreme Court of the State of Oklahoma erred in holding that under the Atoka Agreement, which became a
6 law as Section 29 of an "act for the protection of the people of the Indian Territory, and for other purposes," 30 Statutes 495; and under the Choctaw-Shickasaw Supplemental Agreement, entitled" an Act to Ratify and Confirm an Agreement with the Choctaw and Chickasaw Tribes of Indians, and for other purposes," 32 Statutes 641; that allotted lands of members of the Choctaw and Chickasaw Tribes of Indians were exempt from forced sale only as against purely contract debts.

VII.

The Supreme Court of the State of Oklahoma erred in holding that Section 15 of the Act of Congress of July 1, 1902, entitled "An Act to Ratify and Confirm an Agreement with the Choctaw and Chickasaw Tribes of Indians, and for other purposes," 32 Statutes 641; exempts allotted lands only from contract obligations and in refusing to give any effect to that part of said section reading as follows "nor shall said lands be sold except as herein provided."

For all of which reasons L. V. Mullen, plaintiff in the trial court and defendant in error in the Supreme Court of the State of Oklahoma, respectfully prays that the judgment of the Supreme Court of said State be reversed, and that the judgment of the trial court be affirmed.

S. T. BLEDSOE,
Attorney for Defendant in Error.

Filed May 1, 1912. W. H. L. Campbell, Clerk.

7 [Endorsed:] No. 1535. In the Supreme Court of the State of Oklahoma. N. H. Simmons et al., Plaintiffs in Error, vs. L. V. Mullen, Defendant in Error. Assignments of Error. Filed May 1, 1912. W. H. L. Campbell, Clerk.

8 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Oklahoma, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of the State of Oklahoma before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between N. H. Simmons, et al., Plaintiffs in Error, and L. V. Mullen, Defendant in Error, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the

9 Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said L. V. Mullen, Defendant in Error as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme

Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 1st day of May, in the year of our Lord one thousand nine hundred and twelve.

[Seal of the United States District Court, Western District of Oklahoma.]

ARNOLD C. DOLDE,
Clerk of the District Court of the United States for the Western District of Oklahoma.

Allowed by
JOHN B. TURNER,
Chief Justice of the Supreme Court of the State of Oklahoma.

[Endorsed] Filed May 1, 1912. W. H. L. Campbell, Clerk.

10 Know all men by these presents, that we, L. V. Mullen as principal, and —— —— as sureties, are held and firmly bound unto N. H. Simmons, Sheriff of Johnson County, Oklahoma, and Lillord F. Ham, Ellen Ham, Dink D. Ham and E. F. Ham for herself and as the next friend of May Ham; and Sherman T. Ham, Maude Ham and Roy H. Ham, in the full and just sum of one thousand dollars, to be paid to the said N. H. Simmons, Sheriff of Johnston County, Oklahoma, and Lillord F. Ham, Ellen Ham, Dink D. Ham and E. F. Ham for herself and as the next friend of May Ham; and Sherman T. Ham, Maude Ham and Roy H. Ham, their certain attorney, executors, administrators, or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents. Sealed with our seals and dated this first day of May, in the year of our Lord one thousand nine hundred and twelve.

Whereas, lately at a term of the Supreme Court of the State of Oklahoma in a suit depending in said Court, between N. H. Simmons, Sheriff of Johnston County, Oklahoma, Lillord F. Ham, Ellen Ham, Dick D. Ham and E. F. Ham for herself and as the next friend of May Ham; and Sherman T. Ham, Maude Ham and Roy H. Ham, as plaintiffs in error and L. V. Mullen as defendant in error a final judgment was rendered against the said L. V. Mullen, and the said L. V. Mullen having obtained a writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the final judgment in the aforesaid suit, and a citation directed to the said N. H. Simmons, Sheriff of Johnston County, Oklahoma, and Lillord F. Ham, Ellen Ham, Dink D. Ham and E. F. Ham for herself and as the next friend of May Ham; & Sherman T. Ham, Maude Ham and Roy H.

Ham citing and admonishing them to be and appear at a Supreme Court of the United States, at Washington, within ninety days from the date thereof.

Now, the condition of the above obligation is such, That if the said L. V. Mullen shall prosecute his writ of error to effect and
11 answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

Sealed and delivered in the presence of—

(Signed) L. V. MULLEN. [SEAL.]
By S. T. BLEDSOE, *His Att'y.* [SEAL.]
W. M. BONNER. [SEAL.]

Approved by—
JOHN B. TURNER,
Chief Justice Supreme Court, State of Oklahoma.

(Endorsement:) Filed May 1, 1912. W. H. L. Campbell, Clerk.

12 The original petition in error and case made in case of N. H. Simmons et al., Plaintiffs in error, vs. L. V. Mullen, Defendant in error, which was filed in the Supreme Court of the State of Oklahoma on March 26, 1910, having been lost, the case made was substituted at the request of the Court, a copy of which substituted case made is as follows:

13 & 14 # 1535.

Case Made.

In the District Court in and for the Seventh Judicial District, Johnston County, Oklahoma.

No. 104.

L. V. MULLEN, Plaintiff,
vs.
N. H. SIMMONS, Defendant; E. F. HAM et al., Intervenors.

Ledbetter & Moore, attorneys for plaintiff.
L. S. Dolman, attorney for defendant and intervenors.
Filed at Tishimingo Mar. 22 1910. Ed. Greene, Dist. Clerk.
Filed Jan. 6, 1912. W. H. L. Campbell, Clerk.

15 STATE OF OKLAHOMA,
Carter County, ss:

In the District Court, —th Judicial District, Johnston County, Oklahoma.

L. V. MULLEN, Plaintiff,
vs.
N. H. SIMMONS, Defendant; MILLORD F. HAM et al., Interpleaders.

Be it remembered that heretofore, to-wit, on the 26th day of November, 1908, Plaintiff, L. V. Mullen, commenced his action against said defendant, by filing in the District Court, his petition, which was in the words and figures following:

In the State of Oklahoma, County of Johnston, in the District Court.

L. V. MULLEN, Plaintiff,
vs.
N. H. SIMMONS, Sheriff of Johnston County, Oklahoma, Defendant.

The plaintiff L. V. Mullen, complaining of N. H. Simmons, respectfully alleges that the plaintiff is a citizen of the United States and a resident of the City of Ardmore, Carter County, and
16 that the defendant is a resident of Johnston County, in the said State and is duly elected and qualified Sheriff of said County.

Second. The plaintiff alleges that the plaintiff is the owner of and in possession of the following described premises to-wit:

The S. ½ of the S. E. ¼ of Section 33, Twp. 3 S R. 4 E.; S. ½ of S. W. ¼ of Section 34, Two. 3 S. R. 4 E.; East 20.53 acres of Lot 4, Section 3; N. 20.94 acres of Lot, 1 Section 4, N. E. ¼ of S. W. ¼ of N. W. ¼ of S. W. ¼ of Section 3, Twp. 4 S. R. 4 E.

that he purchased said premises from F. A. Bonner by warranty deed dated the 17th day of October, 1908, which said deed was filed for record in the office of the Register of Deeds of Johnston County, Oklahoma, on the 20th day of October, 1908, and was on the same day entered of record in Book 2 at page 97 of the deed records of said County.

Third. Plaintiff further states and alleges that the said F. A. Bonner is a member and citizen of the Choctaw Tribe of Indians, of one-sixteenth degree of Indian blood, and that the premises above described constituted his allotment as a member and citizen of said Tribe of Indians; that on said day and date he had the restricted right to sell said land to the plaintiff, and under and by virtue of said deed the said F. A. Bonner did sell and convey said premises, together with an indefeasible title thereto to the Plaintiff.

Fourth. Plaintiff further alleges that the said defendant as the Sheriff of Johnston County, has in his hands an execution issued in the case of —— Hamm vs. F. A. Bonner, heretofore pending in the United States Court for the Southern District of the

17 Indian Territory, at Ardmore, said execution being issued by the District Court of Carter County, Oklahoma, to the Sheriff of Johnson County, Oklahoma; that said judgment was rendered and the debt thereby evidenced contracted more than five years prior to the issuance of said execution and at a time when said premises were inalienable and not in any way subject to said judgment; that under the laws of the United States and the Treaties between the Chickasaw and Choctaw Nations and the United States the said land allotted as aforesaid to the said F. A. Bonner, was exempt from the operation of said judgment, and that said lands cannot be sold under and by virtue of the execution aforesaid, issued upon said judgment, but plaintiff alleges and charges the fact to be that the said N. H. Simmons, as Sheriff of Johnston County, Oklahoma, has wrongfully and unlawfully levied upon and advertised said land for sale under and by virtue of said execution, and unless restrained by this Honorable Court, the said N. H. Simmons, sheriff as aforesaid will on or about the 25th day of November, 1908, sell said premises at public sale, under and by virtue of said execution; that if the said sheriff is permitted *the* sell the said lands as aforesaid, he will execute a deed thereto to the purchaser at said sale; that the plaintiff in said judgment and the sheriff claim to have the right to sell said lands and claim that the sale thereof will vest in the purchaser at said sale a title to said premises which claim on the part*y* of the said plaintiff and said sheriff and the deed which the said sheriff will execute will cast a cloud upon the title to said land and injure and damage the same; that the Honorable J. T. West, Judge of this District is now absent from Johnston County, by reason of which fact the application for the temporary restraining order will be made to Honorable Nicholas Wolf, County Judge of Johnston County.

18 Wherefore plaintiff prays that the said defendant be summoned as provided by law; that a temporary restraining order be granted by the said Nicholas Wolf, County Judge of Johnston County, and that on final hearing the said N. H. Simmons, Sheriff of Johnston County, be restrained from levying upon and selling said premises under and by virtue of said execution, and that the plaintiff have all other relief to which he may be entitled.

(Signed) LEDBETTER & MOORE,
Attorneys for Plaintiff.

I, J. S. Mullen, Agent of the plaintiff, L. V. Mullen, after being sworn on oath do say that the allegations in the above and foregoing complaint are within my knowledge true as I verily believe.

(Signed) J. S. MULLEN.

Subscribed and sworn to before me this 25th day of November, 1908.

(Signed) J. O. MULLEN, *Notary Public.*

My commission expires January 10th, 1909.

On which petition is endorsed the following: Case "No. 104. L. V. Mullen, Plaintiff vs. N. H. Simmons, Sheriff of Johnston

County, Defendant. Petition. Filed at Tishomingo November 26th 1908, Ed Green, District Clerk. By R. C. Fleming, Deputy. Ledbetter & Moore, attorneys for Plaintiff."

The Judge of the District Court being absent from the County, said petition was on said day presented and read to the Judge of the County Court of Johnston County and thereupon the Honorable Nicholas Wolfe, Judge of said Court issued an order of injunction which was in the words and figures as follows:

19 In the State of Oklahoma, County of Johnston, in the District Court.

Order.

L. V. MULLEN, Plaintiff,
vs.
N. H. SIMMONS, Sheriff of Johnston County, Defendant.

On this the 26th day of November, 1908, came on to be heard before me, Nocholas Wolfe, County Judge in and for Johnston County, in the absence of Honorable A. T. West Judge of this District, the petition of the plaintiff, L. V. Mullen, for a temporary restraining order to prevent the said N. H. Simmons, as sheriff of Johnston County, form selling under execution the following described premises to-wit:

The S. ½ of the S. E. ¼ of section 33, Twp. 3 South Range 4 East, and the S. ½ of the S. W. ¼ of S. W. ¼ of section 34, Twp. 3 South, Range 4 E., East 20.53 acres of Lot 4, of section 3; N. 20.94 acres of Lot 1, of section 4; N. E. ¼ of S. W. ¼ of N. W. ¼; N. E. ¼ of N. W. ¼ of S. W. ¼ of Section 3, Twp. 4 S. R. 4 E.,

and after hearing said petition and being fully advised in the premises, it is hereby ordered, adjudged and decreed that the said N. H. Simmons, as sheriff of Johnston — Oklahoma, be and he is hereby restrained and enjoined until the further order of the District Court or the Judge thereof, in and for said Johnston County, from selling said premises under said execution and enjoined from further exposing said premises to sale under said execution, and from in any way carrying said execution into effect, in so far as the same shall have been levied upon said premises.

Upon the plaintiff executing a bond in the sum of $1,000.00 to be approved by the District Clerk.

Given under my hand on this the 26th day of November, 1908.

[SEAL.] NICK WOLFE,
County Judge of Johnston County.

20 That then was ordered upon the back thereof the following: Case No. 104, L. V. Mullen, Plaintiff, vs. N. H. Simmons, Sheriff of Johnston County, Defendant. Order. Ledbetter & Moore, attorneys for Plaintiff. That upon the — day of November,

1908, said plaintiff filed his bond which was duly approved by the Clerk of the District Court.

That said order was upon the same day served upon defendant and due return thereof made as follows:

"Received this order on November the 26th, 1908, at 10.30 A. M. and served the same upon N. H. Simmons, Sheriff of Johnston County, Oklahoma, at 10.30 A. M. on November 26th, 1908, by delivering to the said defendant personally in said County of Johnston, Oklahoma, a true and correct copy of the within order.

(Signed) MART MILLER,
Constable of Tishomingo Township, Johnston Co., Oklahoma.
(By) WM. MILLER, *Deputy.*

Upon the 14th day of December, 1908, said defendant N. H. Simmons filed his answer to said petition which was in words and figures as follows:

In the District Court in and for the Seventh Judicial District, Johnston County, Oklahoma.

L. V. MULLEN, Plaintiff,
vs.
N. H. SIMMONS, Sheriff of Johnston County, Oklahoma, Defendant.

Answer.

Now comes the defendant herein, and for his answer to plaintiff's petition denies each and every, all and singular the allegations
21 and averments set out in plaintiff's petition, except such allegations and averments as are hereinafter specifically admitted.

First. Defendant admits that he is Sheriff of Johnston County, Oklahoma.

Second. Defendant alleges that at the time the restraining order issued in this cause was served upon him, that he was in possession of said above described lands under a levy made by him on the 19th day of October, 1908; that said levy was made under an execution issued to him out of the District Court of Carter County, upon a judgment in cause numbered 3679, wherein E. F. Ham et al. were plaintiffs, and Frank Bonner was defendant; that said execution was received by the said defendant on the 1st day of October, 1908, after the same had been duly entered on the execution docket in the office of the clerk of this court as required by law, a true and correct copy of which execution, with all of the endorsements thereon, is hereto attached, marked Exhibit A hereto, and made a part hereof, as though fully set out herein.

Third. Defendant admits that said Frank Bonner is a member and citizen of the Choctaw Tribe of Indian- of a one-sixteenth degree of Indian blood.

Fourth. The defendant admits that he has advertised said lands for sale, and has proceeded in all respects as required by law to sell same to satisfy said execution, when restrained from doing so by order of this court.

Fifth. Defendant states that said land is not subject to levy and sale under said execution.

22 Sixth. Further answering defendant says that the plaintiff, E. F. Ham et al., in said judgment upon which said execution was issued, are necessary and interested parties in said cause, and asks that they may be made parties to said action, and that this defendant be relieved from further defense in said cause.

Wherefore, defendant prays that said restraining order be dissolved and said cause dismissed as to this defendant, and for such other and further relief as may be just and proper.

(Signed) L. S. DOLMAN,
Attorney for Defendant.

STATE OF OKLAHOMA,
Carter County, ss:

N. H. Simmons, being first duly sworn, upon oath says that he has read the above and foregoing answer, and that the matters and things therein set forth are true.

—— ——.

Subscribed and sworn to before me this — day of December, 1908.

——— ———,
Notary Public.

My commission expires —.

STATE OF OKLAHOMA,
Carter County, ss:

In the District Court of the Eighth Judicial District, Sitting in and for said County.

E. F. HAM et al., Plaintiff,
vs.
FRANK BONNER, Defendant.

Execution.

23 STATE OF OKLAHOMA:

To the Sheriff of Johnston County, in said State, Greeting:

Whereas, E. F. Ham et al., on the 31st day of January, 1901, obtained a judgment before the United States District Court of the Southern District within and for the Indian Territory against Frank Bonner, for the principal sum of Twenty-nine Hundred Sixty-six and 66¾/100 Dollars, Debt, $2,966.66¾ and for the sum of Twenty-nine and 00/100 Dollars cost $29.00 and the clerk's accruing costs about Three 00/100 Dollars $3.00.

And also interest will be computed at the rate of 8% per *cent* annum from the 31st day of January, 1901, on the principal sum of $2,966.66¾ to date of service of this writ. There has been paid on this judgment the sum of No Dollars, and an attorney's fee No

Dollars together with $— no cost and about $— no clerk's accruing costs; and the interest on $— at the rate of — per annum from the — day of ——, 1908.

Now therefore, you are hereby commanded that of the goods and chattels of the said Frank Bonner you cause the money above specified to be made; and for want of goods and chattels you cause the same to be made of the lands and tenaments of said debtor. And make return of this execution, with your certificate thereon, showing the manner you have executed the same, within sixty days from date hereof.

In witness whereof, I have hereunto set my hand and affixed the seal of said court at my office in Ardmore, in said County, this 20th day of September, A. D. 1908.

[SEAL.] (Signed) C. T. VERNON,
By THOMAS S. GILL, *Deputy.*

24 Sheriff's Office, Johnston County, State of Oklahoma.

Received this writ this 1st day of October, A. D. 1908, at 10 o'clock A. M., according to the command of the within writ, finding no goods or chattels belonging to the within named defendant whereon to levy, on the 19th day of October, A. D. 1908, I did forthwith levy said writ upon the following described lands of said debtor, situated in Johnston County, State of Oklahoma, to-wit: as shown on description hereto attached, which were liable to satisfy said judgment, and did cause the same to be appraised by V. A. Fine, A. C. Martin and C. A. Hutchinson, three disinterested householders residing within said County, wherein said lands are located, and administered to them on oath impartially to appraise said property levied upon, upon actual view, and said householders did forthwith return to me, under their hands, an estimate of the real value of said property and upon receiving said return I did forthwith deposit a copy thereof with the Clerk of the said District Court from whence the execution issued, and did cause public notice of the time and place of sale of said lands to be given over 30 days before the day of sale thereof, by advertising in the Johnston County, Democrat, a newspaper printed in and of general circulation in Johnston County, State of Oklahoma, a copy of said notice with the printer's affidavit *is* hereto attached and made a part of this return, and on the 26th day of November, 1908, one L. V. Mullen filed in the office of the Clerk of the District Court of Johnston County, Oklahoma, a suit against N. H. Simmons, Sheriff, and the Judge of said Court being absent from the County, Nick Wolfe, County Judge of said County, on said day issued in said cause a temporary restraining order, restraining said Sheriff from offering for sale the lands levied on herein as the property of the defendant, Frank Bonner, to-wit:

25 The S. ½ of the S. E. ¼ of Section 33, Township 3 South, Range 4 East: the S. ½ of the S. W. ¼ of the S. W. ¼ of Sec. 34, Town. 3 South, Range 4 E., and the E. 20.53 acres of Lot 4, and the N. E. ¼ of the S. W. ¼ of the N. W. ¼, and the N. E. ¼

of the N. W. ¼ of the S. W. ¼ of Section 3, and the N. 20.24 acres of Lot 1 of Section 4, Town. 4 South, Range 8 East; which order was on said 26th day of November 1908 *was* served on me by M. G. Miller, Constable of Tishomingo, Twp. of said County, by Will Miller, Deputy, on said account I return this paper unsatisfied, and did not offer said property for sale.

N. H. SIMMONS,
Sheriff Johnston County.

Dated this 26th day of October, 1908.

By T. J. WORTHEN,
Under Sheriff.

(Endorsements:) No. 3679. Execution — general form. E. F. Ham et al., Plaintiff, vs. Frank Bonner, Defendant. Judgment rendered 1/31, 1901. Returnable within sixty days. Filed this 30th day of November, A. D. 1908. C. T. Vernon, Clerk, By S. S. Parker, Deputy.

Debt	2,966.66¾
Accrued costs	29.00
Clerk's accruing costs	3.00
Interest on $2,966.66¾ at 8% per annum from the 31st day of January, 1901	.....
Total	.....
Less amount paid	1,809.67
	4,907.33¾

Sheriff's Fees.

Service and return	.50
Summoning appraisers	1.50
Appraisement	.50
Appraisers' fees, 3 at $1.50 each	4.50
Advertis*h*ing	1.00
Mileage, 44 miles	4.40
Printer's fees	....
1/1/'08	4.50
Clerk's costs at Tishomingo	.35

N. H. SIMMONS, *Sheriff*,
By J. W. WORTHN, *Deputy.*

Dated this 3rd day of October, 1908.

SHERIFF OF JOHNSTON COUNTY,
By T. J. WORTHN, *Deputy.*

Filed at Tishomingo, October 1, 1908.

ED GREEN, *District Clerk,*
By R. C. FLEMMING, *Deputy.*"

With the endorsements thereon as follows: "104 number of case. L. V. Mullen, Plaintiff, vs. N. H. Simmons, Defendant, Sheriff. Answer. Filed at Tishomingo, December 14th, 1908. Ed Green, District Clerk."

That upon the 22nd day of December, 1908, leave of court being first had and obtained, Millord F. Ham, Ellen Ham, Dink Ham and E. F. Ham, for herself and as next friend for May Ham, Sherman Ham, Maude Ham and Roy H. Ham filed an interplea in said
27 cause which was in words and figures as follows:

In the District Court in and for the Seventh Judicial District, Johnston County, Oklahoma.

L. V. MULLEN, Plaintiff,
vs.
N. H. SIMMONS, Sheriff, Johnston County, Oklahoma, Defendant.

Interplea.

Comes now Millord F. Ham, Ellen Ham, Dink D. Ham and E. F. Ham for herself and as the next friend of May Ham; and Sherman T. Ham, Maude Ham and Roy H. Ham, leave of court being first han an- obtained and file this their interplea in said cause, and ask to be made party defendants herein. For their answer to plaintiff's petition filed herein said E. F. Ham et al. alleges and says:

That they are interested in the lands described in plaintiff's petition, as will more fully hereinafter appear; that upon the 31st day of January, 1901, the interpleaders herein recovered a judgment in the United States District Court for the Southern District of Indian Territory sitting at Ardmore, Oklahoma, against Frank Bonner, in the sum of $2,966.66\frac{3}{4}$, a true and correct copy of which judgment is hereto attached, marked "exhibit A" and made a part hereof; that said judgment was rendered against said Frank Bonner as damages for the killing of the husband of said E. F. Ham, and the father of the other interpleaders herein; that execution was issued upon said judgment on the 19th day of June, 1901, and was on the 16th day of August returned unsatisfied; that alias executions have been issued on said judgment since said date, the last of which was on the
28 — day of —, 1906, and all of which was returned unsatisfied; that upon the 29th day of September, 1908, interpleaders caused an execution to issue upon said judgment directed to the Sheriff of Johnston County, and was on the 19th day of October, 1908, levied upon the lands herein described, which said execution was restrained and enjoined in the above entitled cause; that upon the 23rd day of February, 1906, the defendant Frank Bonner became the owner of the lands described in plaintiff's petition, situated in the Southern District of Indian Territory by allotment of the same as an Indian of the — Tribe of Indians of a one-sixth blood, and said judgment thereupon became a lien upon said lands; that subsequent thereto that part of the Indian Territory and the Southern

District where said lands are located became a part of what is now Johnston County, and the said Interpleaders allege that said judgment is still a lien upon the lands of the said Frank Bonner, situated in Johnston County, Oklahoma, and subject to the payment of said judgment and was a lien upon the same at the time of the alleged purchase by plaintiff of said lands.

For answer to plaintiff's petition filed herein, the interpleaders say that the said L. V. Mullen, at the time of the alleged conveyance set out in said petition to him of said lands described therein, had full knowledge and notice of said judgment of these interpleaders against said Frank Bonner, and knew that an execution had been issued and levied upon said property, and that the said L. V. Mullen is not an innocent purchaser of said property, and that the said plaintiff took the same, subject to the judgment, interest and costs of the Interpleaders herein. These interpleaders deny that said land is not subject to said judgment, interests and costs.

Wherefore, said Interpleaders pray that said liens be fore-
29 closed, said property sold to satisfy judgment interest and costs, by order of this court, as required by law, and that these interpleaders recover of and from the plaintiff herein all their costs herein expended; and for such other and further relief as may be just and proper.

(Signed) L. S. DOLMAN,
Attorney for Interpleaders.

STATE OF OKLAHOMA,
Carter County, ss:

E. F. Ham, of lawful age being first duly sworn, upon oath says that she is one of the Interpleaders herein; that she has read the above and foregoing interplea, and that the matters and things therein set forth are true.

(Signed) E. F. HAM.

Subscribed and sworn to before me this 14th day of December, 1908.

C. H. ESKEW,
Notary Public.

My commission expires December 10th, 1911.

With endorsements thereon as follows:
"No. 104. L. V. Mullen, Plaintiff, vs. N. H. Simmons, Defendant. Interplea of Ham et al. Filed at Tishomingo, Dec. 22nd, 1908; Ed. Green, District Clerk.
"Leave granted to E. F. Ham et al. to file interplea granted on this 17th day of Dec., 1908."

A. K. WEST, *Judge.*

30 That upon the 19th day of January, 1910, plaintiff filed a general and special demurrer to defendants' answer and Interpleaders' petition, which was in words and figures as follows:

"In the Johnston District Court."

MULLEN, Plaintiff,
vs.
N. H. SIMMONS, Defendant; E. F. HAM et al., Interpleaders.

Demurrer.

Come now the Plaintiff and demurrers to the Defendants Sheriff's answer and the interplea of Ham et al. and for cause says:

First. Because said answer and interplea do not state facts sufficient to constitute a defense to plaintiff's petition.

Second. Because said answer and interplea fail to show that the judgment upon which the execution was herein issued was a lien upon the lands levied upon herein and fail to show that said lands were seized by the said sheriff under said execution prior to the making and delivering of the deed, by execution defendant to this plaintiff and fails to show that any lien attached on and to said ands by virtue of the issueing and levying said execution by said sheriff.

Third. Because said lands were taken in allotment by Frank Bonner, the execution defendant herein, as a member or nation of Indians as his a*ll*otive share of the lands of the Chickasaw and Choctaw Tribes and was not subject, under the law, to any
31 debt, deed, contract or obligation of any character made prior to the time at which said land could be alienated by the allottee, and that said judgment upon which the execution herein issued, was recovered against the said allottee more than five years before the same became alienable by him, and that said lands were not subject to the judgment liens on the interpleaders herein nor to be seized and sold under an execution issued upon the judgment pleaded by the sheriff and interpleaders herein.

Therefore plaintiff prays judgment upon his demurrer.

LEDBETTER & MOORE AND
JOHN YOUNG,
Attorneys for Plaintiff.

With the endorsements thereon as follows: "Mullen vs. N. H. Simmons, Ham et al. Interpleaders. Demurrer of Plaintiff."

And upon the same day said cause coming on to be heard upon said demurrer and the same being argued by counsel and the court having considered the same ordered and adjudged that said demurrer be sustained, to which ruling of the court defendants and interpleaders by their counsel excepted. Thereupon defendants and interpleaders refused to plead further in said cause and the court rendered the following judgment:

In the Johnston District Court.

L. V. MULLEN, Plaintiff,
vs.
N. H. SIMMONS, Sheriff, Defendant; —— HAM et al., Interpleaders.

Judgment.

On this day this cause coming on to be heard upon the demurrer of the plaintiff, the plaintiff appearing by his attorneys, and
32 the defendant and the Interpleaders by their attorneys, and the court being sufficiently advised in the premises, doth over-rule plaintiff's general demurrer and his first special demurrer to which ruling of the court the plaintiffs except and the court doth sustain plaintiff's second special demurrer to which ruling of the court the defendant and the Interpleaders except, and the Interpleaders and the defendant elect to stand upon their answer and interplea herein, refuse to plead further and the court finds for the plaintiff and that he is entitled to the relief prayed for in his petition and that the temporary restraining order heretofore issued should be made perpetual.

It is therefore Considered, Ordered and Adjudged by the court that the defendant N. H. Simmons as sheriff of Johnston County, Oklahoma, and his deputies and the Interpleaders and each of them their attorneys, agents and any other person acting by or for them be and they are hereby enjoined and restrained forever from issueing or causing to be issued any execution or other process upon the judgment rendered against Frank Bonner and in favor of the Interpleaders herein and leaving same upon the lands described in the pleadings herein, to-wit:

The S. ½ of the S. E. ¼ of Section 33, Twp. 3 South, Range 4 E.; S. ½ of S. W. ¼ of S. W. ¼ of Section 34, Twp. 3 S. R. 4 E.; E. 20.53 aces of Lot 4, Section 3, N. 20.94 aces Lot 1, section 4, N. E. ¼ of S. W. ¼ of N. W. ¼ of N. E. ¼ of N. W. ¼ of S. W. ¼ of Section 3, Twp. 4 S. R. 4 East.

or any part thereof and that defendant and interpleaders pay all cost of this suit, and interpleaders pray an appeal to the Supreme Court of the State of Oklahoma, which is by the court granted and for good reason shown, interpleaders are given ninety days in which to prepare and serve a case made.

A. T. WEST, *Judge.*

33 That upon the 22nd day of January, 1910, defendant and Interpleaders filed a motion for a new Trial and a rehearing which was in words and figures as follows:

In the District Court in and for the County of Johnston, State of Oklahoma.

L. V. MULLEN, Plaintiff,
vs.
N. H. SIMMONS, Defendant.

Motion for a New Trial.

Now comes the defendant and Interpleaders herein and moves the court to set aside and vacate the decision heretofore rendered herein and grant a new trial for the following reasons to-wit:

First. That the decision is contrary to law.

Second. For errors of law occurring at the trial and excepted by defendant and interpleaders.

Third. Error of the court in sustaining a demurrer to defendant's answer and the plea of the Interpleaders herein.

(Signed) L. S. DOLMAN,
Attorney for Defendant and Interpleaders.

Which said motion was endorsed upon the back as follows:

"No. 104. Defendant, N. H. Simmons. Motion for a new Trial."

Filed at Tishomingo, Jan'y 22, 1910.
ED GREEN, *Dist. Clerk.*
—— ——, *Deputy*

34 That upon the 31st day of January, 1910, said motion for a new trial was after due consideration by the court overruled, to which said defendant and interpleaders excepted, and prayed an appeal to the Supreme Court, and an extension of time to make and serve a case made, which prayer for an appeal was allowed and time given, all of which was included in an order of the court, which was in words and figures as follows:

In the District Court in and for the County of Johnston, State of Oklahoma.

L. V. MULLEN, Plaintiff,
vs.
N. H. SIMMONS, Defendant.

Order.

Now upon this 31st day of January, 1910, comes on to be heard the motion of the defendant and Interpleaders herein for a new trial and the court after argument of counsel overrules the same to which ruling of the court defendant and Interpleaders at the time excepted.

And said defendant and interpleaders pray on appeal to the Supreme Court and an extension of time within which to make and serve a case made herein.

It is therefore ordered that said prayer for appeal be allowed and that said defendant and interpleaders be granted 90 days from this date to make and serve a case made, plaintiffs to have ten days thereafter to suggest amendments same to be settled on five days' notice in writing to either party.

A. T. WEST, *Judge.*

35 Which said order was endorsed upon the back as follows: "No. 104. L. V. Mullen, Plaintiff, vs. N. H. Simmons et al., Defendants. Order Overruling Motion for a New Trial. Filed at Tishomingo, Oklahoma, January 31st, 1910. Ed Green, Clerk."

36 STATE OF OKLAHOMA,
Johnston County, ss:

In the District Court in Said County and State.

L. V. MULLEN, Plaintiff,
vs.
N. H. SIMMONS, Defendant; MILLORD F. HAM et al., Interpleaders.

Stipulation of Attorneys.

It is hereby stipulated and agreed by and between the parties hereto that the foregoing case made contains a full, true, correct and complete copy and transcript of all of the proceedings in said cause, including the pleadings filed and proceedings had, all of the evidence offered and introduced, and the orders and rulings made and exceptions allowed and all of the records upon which the judgment and Journal entry in said cause was made, and the same is a full, true, complete and correct case made. And the said plaintiff waives the right to suggest amendments to said case made and hereby consents that the same may be settled immediately and without notice, and hereby joins in the request of the defendant that the judge of said Court settle the same and order the same certified to the Clerk of the District Court and filed according to law; and said plaintiff hereby waives the issuance and service of summons in error from the Supreme Court of the State of Oklahoma.

(Signed) LEDBETTER & MOORE,
Attorneys for Plaintiff.
L. S. DOLMAN,
Attorney for Defendant and Interpleaders.

37 STATE OF OKLAHOMA,
Johnston County, ss:

I, the undersigned attorney for the plaintiff in the foregoing suit, certify that the foregoing case was duly served on us this 26th day of Feb'y 1910.

(Signed) LEDBETTER & MOORE,
Attorney for Plaintiff.

This is to certify that the foregoing above case made has been duly served in time, and the same duly submitted to me for settlement and signing as required by law, by the parties to said cause, that the same as above set forth is true and correct and contains a true and correct statement of all the pleadings, motions, orderes, evidence, findings, proceedings and judgments had in such cause; and I hereby settle allow, certify and sign the same as true and correct, and hereby order that the Clerk of the District Court attest the same with the Seal of said Court and file the same of record.

Witness my hand at Ada this 22nd day of M'c'h 1910.

(Signed) A. T. WEST, *Judge.*

Attest:

ED GREENE, *Clerk.* [SEAL.]

(Endorsement:) #1535. Filed Jan. 6, 1912. W. H. L. Campbell, Clerk.

38 In the Supreme Court of the State of Oklahoma.

N. H. SIMMONS et al., Plaintiffs in Error,
vs.
L. V. MULLEN, Defendant in Error.

Acceptance of Service of Brief and Waiver of Summons in Error.

Comes now, Ledbetter & Moore, attorneys for Defendant in Error, and upon the 25" day of March, 1910, waives the issuance an- service of summons in Error in the above entitled cause and enter their appearance in the Supreme Court of the State of Oklahoma for and on behalf of the defendant in Error. And at the same time said defendant in Error accepts service of three copies of the Brief and argument of the Plaintiffs in Error in said cause.

(Signed) LEDBETTER & MOORE,
Attorney for Defendant in Error.

(Endorsement:) #1535. N. H. Simmons et al. Plaintiffs in Error vs. L. V. Mullen, Defendant in Error. Acceptance of Service of Briefs and Waiver of Summons in error. Filed Mar. 26, 1910. W. H. L. Campbell, Clerk.

39 Supreme Court, March Term, 1910; March 30th, 1910, Fourteenth Judicial Day.

#1535.

N. H. SIMMONS et al., Plaintiffs in Error,
vs.
L. V. MULLEN, Defendant in Error.

And now on this day it is ordered by the Court that the motion herein to submit cause on typewritten briefs, be, and the same is hereby allowed.

40 In the Supreme Court of the State of Oklahoma.

No. 1535.

N. H. SIMMONS, E. F. HAM, MILLARD HAM, ELLEN HAM, DINK D. Ham, and E. F. Ham as Next Friend of May Ham, Sherman T. Ham and Maude Ham, Plaintiffs in Error.

vs.

L. V. MULLEN, Defendant in Error.

Motion.

Now comes the Defendant in Error, and respectfully moves the court to grant him permission to file Brief out of time herein, and for ground of said Motion this Defendant alleges that the case has been delayed on the Docket, and because of the crowded condition of said Docket, the necessity for promptness in briefing said case has not heretofore existed.

(Signed) W. A. LEDBETTER,
Attorney for Defendant in Error.

Service of the above motion is hereby accepted this May 18" 1911.

(Signed) L. S. DOLMAN,
Att'y for Pl'ff in Error.

(Endorsement:) No. 1535. In the Supreme Court of the State of Oklahoma. N. H. Simmons et al. Plaintiffs in Error vs. L. V. Mullen, Defendant in Error. Motion. Filed May 25, 1911. W. H. L. Campbell, Clerk.

41 Supreme Court, May Term, 1911; June 8th, 1911, Third Judicial Day.

#1535.

N. H. SIMMONS, Plaintiff in Error,

vs.

L. V. MULLEN, Defendant in Error.

And now on this day it is ordered by the court that the motion herein for leave to file briefs out of time, be, and the same is hereby allowed.

42 In the Supreme Court of the State of Oklahoma.

No. —.

N. H. SIMMONS et al., Plaintiffs in Error,
vs.
L. V. MULLEN, Defendant in Error.

Motion to Advance.

Now comes the Defendant in Error and respectfully moves the court to advance this cause for hearing at the earliest possible date, and in support of said motion states that the question involved is one of great public moment, to-wit, whether or not lands allotted to members of the five civilized tribes of Indians, in cases where the restriction on the right of alienation has been removed, may be levied upon and sold under execution.

Briefs on both sides of the case are now on file in the office of the Clerk of this court.

Respectfully submitted.
(Signed) W. A. LEDBETTER,
Attorneys for Defendant in Error.

(Endorsement:) No. 1535. In the Supreme Court of the State of Oklahoma. N. H. Simmons, et al., Plaintiffs in Error vs. L. D. Mullen, Defendant in Error. Motion to Advance. Filed Sep. 13, 1911. W. H. L. Campbell, Clerk.

43 In the Supreme Court of the State of Oklahoma.

N. H. SIMONS et al., Plaintiffs in Error,
vs.
L. V. MULLEN, Defendant in Error.

Answer to Motion.

Comes now the plaintiff in error in answer to motion, Defendant herein joins with plaintiff to advance said cause upon the docket, -cause of the importance of the question involved, to-wit:

Whether or not lands allotted to members of the Choctaw and Chickasaw Nation of less than quarter bloods may be taken and sol- upon execution subsequent to May 27, 1908, for a tort committed prior to said date and for which damages had been recovered.

L. S. DOLMAN,
Attorney for Plaintiffs in Error.

[Endorsed:] 1535. N. H. Simmons et al., Plaintiff in Error, vs. L. V. Mullen, Defendant in Error. Copy. Answer to Motion. Filed Sep. 16, 1911. W. H. L. Campbell, Clerk.

44 Supreme Court, September Term, 1911; September 26th, 1911, Eighth Judicial Day.

#1535.

N. H. SIMMONS et al., Plaintiffs in Error,
vs.
L. V. MULLEN, Defendant in Error.

And now on this day it is ordered by the court that the above cause be, and the same is hereby advanced and set for the November 1911 Term of Court.

45 Supreme Court, September Term, 1911; September 26th, 1911, Eighth Judicial Day.

#1535.

N. H. SIMMONS et al., Plaintiffs in Error,
vs.
L. V. MULLEN, Defendant in Error.

And now this cause comes on for hearing by the court upon the motion herein to advance the above cause on the docket of this court, and the court having considered the same finds that said motion to advance should be sustained, and it is so ordered.

46 Supreme Court, November Term, 1911; November 14th, 1911, First Judicial Day.

#1535.

N. H. SIMMONS et al., Plaintiffs in Error,
vs.
L. V. MULLEN, Defendant in Error.

And now on this day the above cause is submitted on the record and briefs filed herein.

47 Supreme Court, March Term, 1912; March 12th, 1912, First Judicial Day.

#1535.

N. H. SIMMONS et al., Plaintiffs in Error,
vs.
L. V. MULLEN, Defendant in Error.

And now this cause comes on for final decision and determination by the court upon the records and briefs filed herein. And the court having considered the same finds that the judgment of the trial court should be reversed and rendered.

It is therefore ordered and adjudged by the court that the judgment of the trial court be, and the same is hereby reversed and rendered.

Opinion by Turner, C. J.

All the Judges concur.

48 In the Supreme Court of the State of Oklahoma.

(Filed Mar. 12, 1912. W. H. L. Campbell, Clerk.)

No. 1535.

N. H. SIMMONS et al., Plaintiffs in Error,
vs.
L. V. MULLEN, Defendant in Error.

(*Syllabus by the Court.*)

The exemption of lands, allotted under an act approved July 1st, 1902, known as the Supplemental Agreement between the Choctaw and Chickasaw Nations with the United States, from any "debt * * * contracted prior to the time at which said land may be alienated" does not exempt them from liabilities for the torts of the allottee perpetrated prior to the allotment.

Error from the District Court of Johnston County.

A. T. West, Judge.

Reversed.

L. S. Dolman, Attorney for Plaintiffs in Error.

Ledbetter & Moore, Attorneys for Defendant in Error.

49 *Opinion of the Court.*

By TURNER, *C. J.*:

On November 26, 1910, L. B. Mullen, defendant in error, sued N. H. Simmons, as Sheriff of Johnston county, in the district court of said county. The petition substantially states that plaintiff is the owner of a certain tract of land (describing it) conveyed to him from F. A. Bonner by warranty deed October 12th, 1908, duly filed for record; that said Bonner is a citizen of the Choctaw Tribe of one-sixteenth (1-16) degree of Indian blood; that said land was his allotment as a member of said tribe which he, on said day, had the unrestricted right to sell; that defendant as Sheriff aforesaid had levied an execution on said land issued on a judgment in the case of Millord F. Ham et al. vs. F. A. Bonner theretofore pending in the United States court for the Indian Territory Southern district at Ardmore; that said judgment was rendered and the debt thereby evidenced contracted more than five years prior to the date of said execution and at a time when said lands were inalienable and exempt from the operation of said judgment and could not be sold under execution issued thereon; that said Sheriff had wrongfully

levied upon and advertised said land for sale and would sell the same to satisfy said execution and give a deed therefor and thereby cast a cloud upon his title unless restrained. He prayed that such be, and the same was, done by the temporary restraining order.

For answer defendant admitted the citizenship of said Bonner to be as stated; justified under the writ which was dated October 1st, 1908; alleged that the land was subject to levy and sale there-
50 under; that plaintiffs to said judgment were necessary parties and prayed that they be brought in and the restraining order dissolved. Thereafter came Millord F. Ham and others, plaintiffs in said judgment, and by leave filed their interplea, which substantially states that on January 31st, 1901, they recovered judgment in the United States Court for the Indian Territory, Southern District at Ardmore, against Frank Bonner in tort for some $3,000; that execution issued thereon and was levied as set forth in plaintiff's petition; that on February 23, 1906, said Bonner, a Choctaw of one-sixteenth (1-16) Indian blood, became the owner of said land by allotment whereupon said judgment became and is a lien upon said land and was a lien thereupon at the time he sold the same to plaintiff, who took the same with full knowledge of said judgment and levy of their execution. They prayed that said lien be foreclosed and said land sold to satisfy said judgment, interplea and cost and for general relief. The precise question raised by plaintiff's demurrer, which was sustained, to the answer and interplea is whether this allotment is exempt from execution on a judgment for tort. The trial court held that it was. This was error. Interpleader's judgment was obtained January 31st, 1901. Bonner was allotted pursuant to the provisions of an act approved July 1, 1902, known as the Supplemental Agreement between the Choctaw and Chickasaw Nations with the United States. Section 15 of said act reads:

"Lands allotted to members and freedmen shall not be affected or encumbered by any deed, debt or obligation of any character contracted prior to the time at which said land may be alienated under this act, nor shall said lands be sold except as herein pro-
vided."

51 As the Act of Congress of May 27, 1908, removed restrictions upon the alienation of this allotment and the judgment sought to be enforced against it was obtained prior thereto it is plaintiff's cotnention that said judgment constituted a "debt * * * contracted prior to the time at which said land may be alienated" within the contemplation of said act. Not so. A judgment in damages for tort is not a "debt contracted" within such contemplation. This was our holding in Shelby v. Zeigler, 22 Okla. 799. In that case plaintiff obtained judgment against defendant in damages for tort after the receivers' final certificate had issued to him pursuant to act of Congress May 20th, 1862 (U. S. Comp. St. 1901). Prior to execution on the judgment, and in fraud of plaintiff's rights, defendant conveyed the land. In passing upon the question of whether the same was subject to execution in satisfaction of said judgment the court said:

"Rev. St. U. S., c. 5, Sec. 2296 (U. S. Comp. St. 1901, p. 1398) provides:

'No land acquired under the provisions of this chapter shall in any event become liable to the satisfaction of any debt contracted prior to the issuance of the patent therefor.'

The question presented by this record is whether or not a tort committed, independent of any contract, for which an action would lie at common law for the recovery of damages, but would abate with the death of the aggrieved party, is such a liability as was contemplated, and within the purview of the term 'any debt contracted.'

And, after quoting liberally and with approval from numerous authorities, in effect, held that a judgment in damages for tort, while perhaps a liability, and not a "debt contracted" within the contemplation of that part of the act under construction; and in the syllabus said:

"After the receiver's final receipt or certificate has been issued, the homestead, under Act. Congress May 20, 1862, c. 75, sec. 4, 12 Stat. 394. Rev. St. U. S. c. 5, sec. 2296 (U. S. Comp. St. 1901, 52 p. 1398) is not exempt as against an execution, or other proceedings, on a judgment for tort, independent of any contract, rendered on a date subsequent to the issuance and delivery of such receipt or certificate."

In Brunn v. Mann, 151 Pac. 445, Judge Sanborn, Circuit Judge, speaking for the court said:

"The real controversy between the parties to this suit is whether or not the lands patented to Tillett in 1892 are exempt from liability to pay the judgment in favor of Mann, which is founded on Tillett's wrongful taking and conversion of the plaintiff's cattle in 1881. The acts of Congress under which Tillett secured the lands provided that no land acquired thereunder shall be liable for the satisfaction of any 'debt contracted prior to the issuance' in the one case of the patent (2 U. S. Comp. St. 1901, p. 1398, Sec. 2296; Act May 20th, 1862, c. 75, Sec. 4, 12 Stat. 393), and in the other of the final certificate thereunder (2 U. S. Comp. St. 1901, pp. 1534, 1535; Act March 4, 1896, c. 40, Sec. 4, 20 Stat. 113, 114). The complaint insists that his claim is not a debt contracted by Tillett, but that it is a liability incurred by him for a wrong, and hence that the land is not exempt from the payment of his claim. The defendants challenge this contention and claim the exemption of the lands and the water rights appertaining thereto. If this issue be decided in favor of the complainant, he will be entitled to a sale of the lands, and, if it be determined in favor of the defendants, the lands are free from the complainant's claim. * * *

The acts of Congress declare that no lands acquired under the homestead and timber culture laws shall be liable for the satisfaction of any 'debt contracted prior' to their acquisition from the government. 2 U. S. Comp. St. 1901, p. 1398, Sec. 2296; Act May 20, 1862, c. 75, Sec. 4, 12 Stat. 393; 2 U. S. Comp. St. 1901, pp. 1534, 1535; Act March 4, 1896, c. 40, Sec. 4, 20 Stat. 113, 114, Sec. 4. Tillett acquired these lands under these statutes. He unlawfully

took and converted Mann's cattle before he acquired them. He never contracted, or agreed or consented, to pay for the cattle. The question is: Are lands thus acquired exempt from liability for wrongs perpetrated as well as for debts contracted by those who secure them? The line of demarcation between the two great classes of the liabilities of parties, between liabilities created by torts, can never be absent from the minds of those members of Congress whose duty it is to criticise, amend, and perfect its acts. The Constitution of the United States broadened and deepened this line of separation and projected it through all the legislation in the nation when it prohibited the states from impairing the obligation of contracts (U. S. Const. Art. 1, Sec. 10), but permitted them to impair the obligations of liabilities and judgment for wrongs. Louisiana v. Mayor of New Orleans, 109 U. S. 285, 288, 3 Sup. Ct. 211, 27 L. Ed. 936; Garrison v. City of New York, 21 Wall. 203, 22 L. Ed. 612; McAfee v. Covington, 71 Ga. 272, 51 Am. Rep. 263. * * * If an act provided
53 that lands should be exempt from every liability incurred, there could be no doubt that they would be free from all liabilities, both from those arising out of contracts and from those arising out of torts. If it provided that lands should be exempt from every debt contracted, but should still be chargeable with every other liability incurred by its owners, no one would have the hardihood to say that it was free from liability for their torts. These terms and their meanings could not have failed to occur to those who drafted, or to those who passed, the acts of Congress under consideration, and their rejection of the familiar and broad term 'liability incurred' and their selection and adoption of the limited expression 'debt contracted' is a demonstration that they had no purpose to exempt the lands they gave from liability for wrongs which the patentees might have perpetrated and that they intended to free it from the debts which sprang from their agreements only."

And in the syllabus said:

"The exemption of lands acquired under the homestead laws and the timber culture laws (2 U. S. Comp. St. 1901, pp. 1534, 1535; Act March 4, 1896, c. 40, Sec. 4, 20 Stat. 113, 114; 2 U. S. Comp. St. 1901, p. 1398, Sec. 2296; Act May 20, 1862, c. 75, Sec. 4, 12 Stat. 393) from any 'debt contracted' previous to their acquisition, does not exempt them from liabilities for the torts of the entrymen previously perpetrated."

We are therefore of opinion that the lien of interpleader's judgment attached to the allotment as soon as it came into being; that plaintiff took the land subject thereto and that the same should be enforced and said land sold to satisfy the same and that too notwithstanding the provisions of the 15th section of the Act of May 27th, 1908, which has no material bearing on the question.

The judgment of the trial court is reversed and rendered.

All the Justices concur.

54 In the Supreme Court of the State of Oklahoma.

Number —.

N. H. SIMMONS et al., Plaintiffs in Error,
vs.
L. V. MULLEN, Defendant in Error.

Notice.

To Ledbetter and Moore, Attorneys of Record in the above entitled cause:

You are hereby notified that L. S. Dolman, Attorney of Record for the plaintiffs in error herein, claims a lien upon the judgment rendered in this cause by the Supreme Court of the State of Oklahoma, and the proceeds thereof, for an undivided one-half interest upon a written contract made between him, the said L. S. Dolman, and E. F. Ham et al., plaintiffs herein, upon intervening petition filed in the lower court, for an undivided one-half interest in the proceeds sought to be collected in said action by levy and sale of property involved in said action.

(Signed) L. S. DOLMAN,
Attorney for Plaintiff in Error.

Service of the above and foregoing notice is accepted this 16th day of March, 1912.

(Signed) LEDBETTER & MOORE,
By J. B. MOORE,
Attorneys for Defendant in Error.

(Endorsement:) Number 1535. N. H. Simmons et al., Plaintiffs in Error, vs. L. V. Mullen, Defendant. Notice of Att'y's Lien. Filed Mar. 20, 1912. W. H. L. Campbell, Clerk

55 Supreme Court, March Term, 1912, April 23rd, 1912, Thirteenth Judicial Day.

#1535.

N. H. SIMMONS et al., Plaintiffs in Error,
vs.
L. V. MULLEN, Defendant in Error.

And now on this day it is ordered by the court that the mandate of this court in the above cause be, and the same is hereby stayed.

56 In the Supreme Court of the State of Oklahoma.

Certificate of Clerk.

I, W. H. L. Campbell, Clerk of the Supreme Court of the State of Oklahoma, do hereby certify that the foregoing 55 pages, numbered from one to 55, both inclusive, are a full, true and complete transcript of the record and all proceedings in the case of N. H. Simmons et al., Plaintiffs in error, vs. L. V. Mullen, Defendant in error, in said Supreme Court, as the same remain on file and of record in my office.

In witness whereof, I hereto set my hand and affix the seal of said Court, at Oklahoma City, this 21st day of May, 1912.

[Seal Supreme Court, State of Oklahoma.]

W. H. L. CAMPBELL,
Clerk of the Supreme Court of the State of Oklahoma,
By JESSIE PARDOE, *Deputy.*

Endorsed on cover: File No. 23,223. Oklahoma Supreme Court. Term No. 263. L. V. Mullen, plaintiff in error, vs. N. H. Simmons, sheriff of Johnston County, Oklahoma, et al. Filed May 28th, 1912.

File No. 23,223.

19

FILED
MAR 9 1914
JAMES D. MAHER
CLERK

Number 263.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1913.

L. V. MULLEN,

Plaintiff in Error,

vs.

N. H. SIMMONS, Sheriff, et al.,

Defendants in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

BRIEF FOR PLAINTIFF IN ERROR

S. T. BLEDSOE,
Attorney for Plaintiff in Error.

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Holden vs. Garrett, 23 Kansas 98.

Koheler vs. Ball, 2 Kansas 160.

Mullen vs. United States, 224 U. S. 448.

IN THE

Supreme Court of the United States

October Term, 1913.
Number 263.

L. V. MULLEN,
Plaintiff in Error,

vs.

N. H. SIMMONS, Sheriff, et al.,
Defendants in Error.

In Error to the Supreme Court of the State of Oklahoma

BRIEF FOR PLAINTIFF IN ERROR

STATEMENT.

This case comes to this court on writ of error to a judgment of the Supreme Court of the State of Oklahoma which had reversed a judgment in favor of the plaintiff in

error here, and the plaintiff below, and rendered the same in favor of the defendants in error here, defendants below

For convenience, the plaintiff in error will be referred to as plaintiff, the position he occupied in the trial court, and Simmons, defendant in error, will be referred to as sheriff, and the other defendants in error, who intervened, as parties defendant, will be referred to as defendants in error.

On the 26th day of May, 1908, the plaintiff, Mullen, commenced an action against Simmons as sheriff (tr. 7-8) to restrain him from selling under an execution certain lands allotted to F. A. Bonner, a member of the Choctaw tribe of Indians by blood of one-sixteenth degree Indian blood. It was alleged that the land sought to be subjected to the execution was purchased by plaintiff from Bonner on the 17th day of October, 1908, and the deed conveying said land was duly recorded on the 20th day of October, 1908. That by such purchase the plaintiff became and was the owner of said land. That notwithstanding plaintiff's ownership of said lands, Simmons (sheriff), proceeding under an execution issued in the case of Ham v. Bonner, theretofore pending in the United States Court for the Southern District of the Indian Territory (but upon execution issued by the District Court of Carter County, Oklahoma, to the sheriff of Johnston County, Oklahoma), was about to proceed to sell said land to satisfy the judgment upon which said execution was issued.

In addition to the grounds for equitable relief, which were deemed sufficient, both by the trial court and the Supreme Court of the State, it was alleged that the execution was not a valid lien upon said land, and that it was not subject to sale thereunder because:

1. That the judgment upon which the execution issued was rendered, and the debt thereby evidenced, contracted more than five years prior to the issuance of said execution, and when the premises seized were inalienabe.

2. That under the treaties between the United States and the Choctaw and Chickasaw Nations, and the laws of the United States relating thereto, the land involved, being land allotted to F. A. Bonner, a member of the Choctaw Tribe of Indians by blood, was exempt from the operation of said judgment.

Simmons (sheriff) answered that on the 1st day of October, 1908, he had received an execution in the case of E. F. Ham, et al. vs. Frank Bonner, which execution had been issued out of the District Court of Carter County and duly entered upon the execution docket of Johnston County. He admitted that Bonner was a member of the Choctaw Tribe of Indians of one-sixteenth Indian blood, but averred that the land was subject to execution, and that he had received and levied the same thereon and was proceeding to sell the same thereunder. That the Hams were plaintiffs in said execution and were necessary parties to said proceeding (tr. 10-11). To this answer was attached a copy of the execution and return thereon. This execution was for the principal sum of $2966.66¾

debt, also certain sums for costs. The execution further recited that interest should be computed on the debt at the rate of eight per cent per annum from the 31st day of January, 1901 (tr. 11). The execution was dated September 20, 1908, and the return showed it was received by the sheriff October 1st, 1908, and levied on the land involved on the 19th day of October, 1908, and that said land was advertised for sale thereunder on the 26th day of November, 1908 (tr. 12-13). On December 22nd, 1908, the defendants (Hams') the plaintiffs in execution in the original cause, filed what was designated an interplea, alleging that on the 31st day of January, 1901, they recovered judgment in the United States Court for the Southern District of the Indian Territory at Ardmore against Frank Bonner, in the sum of $2066.66¼; that said judgment was rendered as damages for the killing of the husband of E. F. Ham and the father of the other Hams; that execution was issued upon said judgment on June 19, 1901, and was, on August 16th of said year, returned unsatisfied. It was further alleged that other executions had been issued upon said judgment, "the last of which was on the.....day of....., 1906." That on September 29, 1908, they caused the execution herein involved to be issued; that on the 23rd day of February, 1906, Frank Bonner became the owner of the land in controversy by having the same allotted to him as a member of the Choctaw Tribe of Indians, of one-sixth Indian

blood, and that upon the selection of such lands in allotment the judgment became a lien thereon (tr. 14). That subsequent thereto that that part of the Indian Territory where said lands were located became a part of Johnston County, Oklahoma, and that that part of the Chickasaw Nation in which Ardmore was located became a part of Carter County, Oklahoma. That the plaintiff Mullen purchased with knowledge of the facts and took subject to the execution lien (tr. 15).

The interplea recited that a copy of the judgment was attached thereto and marked Exhibit A. Said copy, however, through oversight, or otherwise, was not attached. To this interplea the plaintiff demurred, grounds of the demurrer being:

1. General—That the answer and interplea failed to state facts sufficient to constitute a defense to plaintiff's cause of action.

2. Because the answer and interplea failed to show that the execution constituted a lien upon the land or that the levy was made prior to the execution and delivery of the deed thereto to plaintiff.

3. Because the lands were the allotment of Frank Bonner as his distributive share as a member of the Choctaw Tribe of Indians by blood, and therefore were not subject to seizure and sale under such execution.

4. That the judgment upon which the execution issued was recovered against Bonner, more than five years before he received said lands in allotment, and before the same became alienable (tr. 16).

Plaintiff's demurrer was sustained and an injunction granted against the sale of the land under said execution (tr. 17).

The defendants prosecuted an appeal to the Supreme Court of the State of Oklahoma where the judgment of the trial court was reversed and rendered in favor of the defendants.

The cause was thereupon duly brought to this court on writ of error.

ASSIGNMENTS OF ERROR.

I.

That the Supreme Court of the State of Oklahoma erred in reversing the judgment of the trial court, and in rendering the same in favor of the plaintiff in error.

II.

That the Supreme Court of the State of Oklahoma erred in holding that the answer and other pleadings of the plaintiffs in error, the defendants in the trial court, constituted a defense to the cause of action of the defendant in error in the Supreme Court of the State, the plaintiff in the trial court.

III.

That the Supreme Court of the State of Oklahoma erred in holding that lands allotted to members of the Choctaw or Chickasaw Tribes of Indians, under the Act of Congress approved July 1, 1902, entitled, An Act to Ratify an Agreement with the Choctaw and Chickasaw Tribes of Indians and for other purposes, 32 Statute 641, were subject to seizure and involuntary sale on execution to satisfy a judgment for tort rendered against the allottee January 31, 1901, and prior to the allotment of said lands.

IV.

That the Supreme Court of the State of Oklahoma erred in holding that the answer of Simmons, plaintiff in

error in this court and defendant in the trial court, stated such facts as would entitle him to seize and sell the lands under the pretended execution directed to him.

V.

That the Supreme Court of the State of Oklahoma erred in holding that the interplea of Lillard F. Ham, et al., filed in the District Court of Carter County, Oklahoma, set forth such a judgment as would support the seizure and sale upon execution of the lands herein involved.

VI.

That the Supreme Court of the State of Oklahoma erred in holding that under the Atoka agreement, which became a law as Section 29 of "An Act for the protection of the people of the Indian Territory, and for other purposes," 30 Statutes 495; and under the Choctaw-Chickasaw Supplemental Agreement, entitled "An Act to Ratify and Confirm an Agreement with the Choctaw and Chickasaw Tribes of Indians, and for other purposes," 32 Statutes 641; that allotted lands of members of the Choctaw and Chickasaw Tribes of Indians were exempt from forced sale only as against purely contract debts.

VII.

The Supreme Court of the State of Oklahoma erred in holding that Section 15 of the Act of Congress of July 1, 1902, entitled "An Act to Ratify and Confirm an

Agreement with the Choctaw and Chickasaw Tribes of Indians, and for other purposes," 32 Statutes 641, exempts allotted lands only from contract obligations and in refusing to give any effect to that part of said section reading as follows: "Nor shall said lands be sold except as herein provided."

ARGUMENT.

There are two vital questions involved:

1. Whether the land involved is subject to seizure and sale under the execution in this case, if said execution is otherwise a valid and subsisting lien.

2. The validity of the execution and the execution lien considered as against plaintiff's rights as a purchaser without regard to whether the land seized is alienable.

It will not be necessary to follow the assignments of error in detail.

The vital facts in chronological order are as follows:

1. The judgment upon which the execution issued was recovered in the United States Court for the Southern District of the Indian Territory at Ardmore, Oklahoma, on the 31st day of January, 1901 (tr. 14).

2. The land involved was allotted to F. A. Bonner, a member of the Choctaw Tribe of Indians by blood (one-sixteenth) on the 23rd day February, 1906 (tr. 14).

3. The deed from Bonner (the allottee) to the plaintiff was duly executed and delivered on the 17th day of October, 1908, and filed for record on the 20th day of October, 1908 (tr. 7).

4. The execution was issued out of the District Court of Carter County, Oklahoma (the lands involved being in Johnston County, Oklahoma), on the 20th day of September, 1908, was received by the sheriff of John-

ston County, October 1st, 1908, and levied upon the lands involved on the 19th day of October, 1908.

5. Suit was filed by the plaintiff to restrain the sale under the execution on the 26th day of November, 1908 (tr. 7-8), and a temporary injunction granted the same day (tr. 9).

The lands involved were not subject to seizure and sale on execution.

The lands involved are those allotted to F. A. Bonner as a member of the Choctaw Tribe of Indians by blood, of one-sixteenth Indian blood. These lands were allotted to Bonner as a member of the Choctaw Tribe of Indians under the Choctaw-Chickasaw Supplemental Agreement (Chapter 1362, 32 Stat. 641), and pursuant to the original Choctaw-Chickasaw Allotment Agreement (Chapter 517, 30 Stat. 495-505). Restrictions upon the right of Bonner to alienate these lands were removed by the Act of May 27th, 1908 (Chapter 199, 35 Stat. 31). The last mentioned act, however, specifically exempted the lands from forced sale on account of any character of personal claim or demand arising or existing prior to the removal of such restrictions.

The pertinent provisions of the agreements referred to and of the Act of May 27th, 1908, are as follows:

Of the original Choctaw-Chickasaw Allotment Agreement:

"All the lands allotted shall be non-taxable while the title remains in the original allottee, but not to exceed twenty-one years from date of patent, and each allottee shall select from his allotment a homestead of one hundred and sixty acres, for which he shall have a separate patent, and which shall be inalienable for twenty-one years from date of patent. This provision shall also apply to the Choctaw and Chickasaw freedman to the extent of his allotment. Selections for homesteads for minors to be made as provided herein in case of allotment, and the remainder of the lands allotted to said members shall be alienable for a price to be actually paid, and to include no former indebtedness or obligation—one-fourth of said remainder in one year, one-fourth in three years, and the balance of said alienable lands in five years from the date of the patent."

"That all contracts looking to the sale or incumbrance in any way of the land of an allottee, except the sale hereinbefore provided, shall be null and void. No allottee shall lease his allotment, or any portion thereof, for a longer period than five years, and then without the privilege of renewal. Every lease which is not evidenced by writing, setting out specifically the terms thereof, or which is not recorded in the clerk's office of the United States Court for the district in which the land is located, within three months after the date of its execution, shall be void, and the purchaser or lessee shall acquire no rights whatever by an entry or holding thereunder. And no such

lease or any sale shall be valid as against the allottee unless providing to him a reasonable compensation for the lands sold or leased."

(Chapter 517, 30 Stat. 507; Bledsoe Indian Land Laws (2nd Ed.), Sections 505, 506.)

And of the Choctaw-Chickasaw Supplemental Agreement as follows:

Sec. 11. "There shall be allotted to each member of the Choctaw and Chickasaw tribes, as soon as practicable after the approval by the Secretary of the Interior of his enrollment as herein provided, land equal in value to three hundred and twenty acres of the average allottable land of the Choctaw and Chickasaw Nations, and to each Choctaw and Chickasaw freedman, as soon as practicable after the approval by the Secretary of the Interior of his enrollment, land equal in value to forty acres of the average allotable land of the Choctaw and Chickasaw Nations; to conform, as nearly as may be, to the areas and boundaries established by the government survey, which land may be selected by each allottee so as to include his improvements. For the purpose of making allotments and designating homesteads hereunder, the forty-acre or quarter-quarter subdivisions established by the government survey may be dealt with as if further subdivided into four equal parts in the usual manner, thus making the

smallest legal subdivision ten acres, or a quarter of a quarter of a quarter of a section."

Sec 12. "Each member of said tribes shall, at the time of the selection of his allotment, designate as a homestead out of said allotment land equal in value to one hundred and sixty acres of the average allottable land of the Choctaw and Chickasaw Nations, as nearly as may be, which shall be inalienable during the lifetime of the allottee, not exceeding twenty-one years from the date of certificate of allotment, and separate certificate and patent shall issue for said homestead."

Sec. 13. "The allotment of each Choctaw and Chickasaw freedman shall be inalienable during the lifetime of the allottee, not exceeding twenty-one years from the date of certificate of allotment.

Sec. 14. "When allotments as herein provided have been made to all citizens and freedmen, the residue of lands not herein reserved or otherwise disposed of, if any there be, shall be sold at public auction under rules and regulations and on terms to be prescribed by the Secretary of the Interior, and so much of the proceeds as may

be necessary for equalizing allotments shall be used for that purpose, and the balance shall be paid into the treasury of the United States to the credit of the Choctaws and Chickasaws and distributed per capita as other funds of the tribes."

Sec. 15. "Lands allotted to members and freedmen shall not be affected or encumbered by any deed, debt, or obligation of any character contracted prior to the time at which said land may be alienated under this act, nor shall said lands be sold except as herein provided."

Sec. 16. "All lands allotted to the members of said tribes, except such land as is set aside to each for a homestead as herein provided, shall be alienable after issuance of patent as follows: One-fourth in acreage in one year, one-fourth in acreage in three years, and the balance in five years; in each case from date of patent: Provided, that such land shall not be alienable by the allottee or his heirs at any time before the expiration of the Choctaw and Chickasaw tribal governments for less than its appraised value."

(Chapter 1326, 32 Stat. 642-3; Bledsoe Indian Land Laws (2nd Ed.), Sections 531 to 536 inc.)

And of the Act May 27th, 1908, as follows:

Sec. 1. "Be it enacted by the Senate and House of Representatives of the United States of America in Con-

gress assembled, that from and after sixty days from the date of this act the status of the lands allotted heretofore or hereafter to allottees of the Five Civilized Tribes shall, as regards restrictions on alienation or incumbrance, be as follows: All lands, including homesteads, of said allottees enrolled as intermarried whites, as freedmen, and as mixed-blood Indians having less than half Indian blood, including minors, shall be free from all restrictions. All lands, except homesteads, of said allottees enrolled as mixed-blood Indians having half or more than half and less than three-quarters Indian blood shall be free from all restrictions. All homesteads of said allottees enrolled as mixed-blood Indians having half or more than half Indian blood, including minors of such degrees of blood, and all allotted lands of enrolled full-bloods, and enrolled mixed-bloods of three-quarters or more Indian blood, including minors of such degrees of blood, shall not be subject to alienation, contract to sell, power of attorney, or any other incumbrance prior to April 26th, 1931, except that the Secretary of the Interior may remove such restrictions, wholly or in part, under such rules and regulations concerning terms of sale and disposal of the proceeds for the benefit of the respective Indians as he may prescribe.

"The Secretary of the Interior shall not be prohibited by this act from continuing to remove restrictions as heretofore, and nothing herein shall be construed to im-

pose restrictions removed from land by or under any law prior to the passage of this act.

"No restriction of alienation shall be construed to prevent the exercise of the right of eminent domain in condemning rights of way for public purposes over allotted lands, and for such purposes sections thirteen to twenty-three inclusive, of an act entitled 'An Act to grant the right of way through Oklahoma Territory and the Indian Territory to the Enid and Anadarko Railway Company, and for other purposes,' approved February 28th, 1902, Thirty-second Statutes at Large, page forty-three, are hereby continued in force in the State of Oklahoma."

(Chapter 199, 35 Stat. 312; Bledsoe Indian Land Laws (2nd Ed.), Sections 738, 739, 740.)

* * * * * * * * * *

Sec. 4. "That all land from which restrictions have been or shall be removed shall be subject to taxation and all other civil burdens as though it were the property of other persons than allottees of the Five Civilized Tribes; Provided, that allotted lands shall not be subjected or held liable to any form of personal claim, or demand, against the allottees arising or existing prior to the removal of restrictions, other than contracts heretofore expressly permitted by law."

Sec. 5. "That any attempted alienation or incumbrance by deed, mortgage, contract to sell, power of attorney, or other instrument or method of incumbering real estate, made before or after the approval of this act, which affects the title of the land allotted to allottees of the Five Civilized Tribes prior to removal of restrictions therefrom, and also any lease of such restricted land made in violation of law before or after the approval of this act shall be absolutely null and void."

(Chapter 199, 35 Stat. 313; Bledsoe Indian Land Laws (2nd Ed.), Sections 745, 746.)

It will be observed that in the original Choctaw-Cickasaw Allotment Agreement (Chapter 517, 30 Stat. 495-507), sometimes referred to as the Atoka Agreement, the homestead of the allottee is made inalienable for twenty-one years from date of patent, and the land in excess of the homestead is made alienable "for a price to be actually paid and to include no former deed or obligation—one-fourth of said remainder in one year, one-fourth in three years, and the balance of said alienable lands in five years from the date of patent. That all contracts looking to the sale or incumbrance in any way of the land of an allottee, except the sale hereinbefore provided, shall be null and void." Then follows a provision regulating leasing, after which we find this declaration: "And no such lease or any sale shall be valid as against the allottee

unless providing to him a reasonable compensation for the lands sold or leased."

Under the Choctaw-Chickasaw Supplemental Agreement (Chapter 1362, 32 Stat. 641) the homestead of the allottee is made inalienable during his lifetime, not exceeding twenty-one years from date of certificate of allotment, and the surplus lands are made alienable after issuance of patent—one-fourth in acreage in one year, one-fourth in acreage in three years, and the balance in five years, with a proviso that such lands shall not be alienated by the allottee or his heirs at any time before the expiration of the Choctaw and Chickasaw tribal governments for less than appraised value.

Section 15 of the Choctaw-Chickasaw Supplemental Agreement provides:

> "Lands allotted to members and freedmen shall not be affected or encumbered by any deed, debt, or obligation of any character contracted prior to the time at which said land may be alienated under this act, nor shall said lands be sold except as herein provided."

The Supreme Court of the State of Oklahoma disposed of the controversy herein upon the construction of section fifteen of the Choctaw-Chickasaw Supplemental Agreement only. It held that the prohibition against enforced alienation found in said section was directed solely against strictly contractual obligations and judgments entered thereon. It is probable, under the inter-

pretation given by that court, that a judgment for damages resulting from a breach of contract would authorize the seizure and sale of the lands allotted to a member of the Choctaw or Chickasaw Tribes of Indians. The word "contracted" was given controlling effect in the consideration of said section, and the words "nor shall said lands be sold except as herein provided" were ignored.

This court was urged to hold in the case of Mullen vs. United States, 224 U. S. 448, that this language ("nor shall said lands be sold except as herein provided") was a prohibition against voluntary alienation, and declined to do so, and very properly. Such language is a part of the section prohibiting involuntary alienation. As a matter of precaution against involuntary alienation there was added the prohibition against any character of involuntary alienation not authorized in the agreement itself. And this interpretaton of the act is fully sustained by section nineteen of the Act of April 26, 1906 (Chapter 1876, 34 Stat. 137; Bledsoe Indian Land Laws (2nd Ed.), Sec. 725), and sections four and five of the Act of May 27, 1908 (Chapter 199, 35 Stat. 312-313; Bledsoe Indian Land Laws (2nd Ed.), Sections 745-746.)

The Act of May 27, 1908, may be consulted for an interpretation of section fifteen of the Choctaw-Chickasaw Supplemental Agreement. Section four of that act is as follows:

"That all land from which restrictions have been

> or shall be removed shall be subject to taxation and all other civil burdens as though it were the property of other persons than allottees of the Five Civilized Tribes. Provided, that allotted lands shall not be subjected or held liable to any form or personal claim, or demand, against the allottees arising or existing prior to the removal of restrictions, other than contracts heretofore expressly permitted by law."
>
> (Chapter 199, 35 Stat. 313; Bledsoe Indian Land Laws (2nd Ed.), Section 745.)

In the Act May 27th, 1908, Congress was reviewing and revising the entire subject of alienation of allotted and inherited lands of members of the Five Civilized Tribes. In section one of the Act it removed all restrictions upon voluntary alienation of the lands of allottees of the class to which Bonner belonged. The lands of Bonner, therefore, became subject to voluntary alienation on the 27th day of July, 1908, but to make certain that Bonner, and other allottees of less than one-half Indian blood, should not have their allotments taken away from them on account of any past transaction of any character it was enacted:

> "that allotted lands shall not be subjected or held liable to any form of personal claim or demand against the allottee arising or existing prior to the removal of restrictions, other than contracts expressly permitted by law."

Whether Congress under section four of the act of May 27, 1908, was giving its own interpretation to section fifteen of the Choctaw-Chickasaw Supplemental Agreement, or whether because of the fact that it was making

the allotted lands of a large number of allottees of Indian blood subject to voluntary alienation, it thought necessary to enlarge the prohibitions against involuntary alienation contained in the various allotment agreements is immaterial. The language used is not only comprehensive enough to include a prohibition against alienation based upon a judgment for damages, but is exclusive in that it prohibits said allotted lands from being held liable to any form of personal claim or demand against the allottee arising before removal of restrictions, with one exception, and that is upon contracts expressly permitted by law. That this is the proper interpretation of section four is made more manifest when considered in connection with section five, which deals with alienation of every character, and particularly with encumbrances, or attempted encumbrances by deed, mortgage, contract to sell, power of attorney, or any other character of instrument.

The use of the terms "personal claim or demand" in the fourth section of the act were undoubtedly designed to cover every possible contingency. If Congress had undertaken to specify the particular classes of demands or obligations upon which involuntary alienation was prohibited it might have overlooked some class, just as it is claimed that it did the particular class here involved, in the original and supplemental agreements.

It is submitted, therefore, that the last and final word of Congress upon the subject, and in the same act in which these lands were made alienable by voluntary alienation, is to prohibit, without condition or equivocation, the enforced alienation of such lands upon any form of personal claim or demand existing prior to removal of restrictions. Upon this issue the judgment of the Supreme Court of the State of Oklahoma should be reversed and the judgment of the trial court affirmed.

The Supreme Court of Oklahoma erred in rendering judgment against the plaintiff on the pleadings.

The judgment upon which the execution here involved was issued was rendered by the United States Court for the Southern District for the Indian Territory, sitting at Ardmore, of which the District Court of Carter County was, by the Enabling Act, made the successor.

The land involved is located in Johnston County, and is, therefore, not subject to a judgment lien on account of a judgment in Carter County, Oklahoma.

Compiled Laws of Oklahoma 1909, Section 5968.
Revised Laws of Oklahoma 1910, Section 5152.
Ritchie v. Higginbotham, 26 Kans. 645.

The Oklahoma statute regulating executions was taken from the Kansas Code. See Revised Laws of Oklahoma, 1910, Article 23.

The deed from Bonner to plaintiff was executed and delivered on the 17th day of October, 1908. The execution was levied on the 19th day of October, 1908. And when levied attached only to the actual interest of Bonner in and to the lands at the time of the levy.

Hamilton, Sheriff, v. Brown, 31 Okl., 213; 120 Pac., 950;
Holden v. Garrett, 23 Kans., 98.

While the conveyance under which plaintiff claims was not recorded at the time of the levy of the execution it had been duly executed and delivered and was on its way to the recorder's office and was recorded on the day succeeding that on which the execution was levied.

The plaintiff having alleged that he acquired the property from Bonner on the 17th day of October, and the defendant having answered asserting a priority of lien on account of an execution levied two days thereafter, it was error to render a judgment against the plaintiff and in favor of the defendants upon the pleadings. Besides, the laws of Oklahoma require, as a condition precedent to the levy of an execution upon real estate that an entry be made thereon by the sheriff that he was unable to find goods or chattels out of which the demand of the execution could be realized. This is required to be evidenced by the entry of the words "no goods" on the execution.

The endorsement on the execution is "not finding", which is not the equivalent of cannot be found. (tr.12)
Compiled Laws of Oklahoma, 1909, Section 5972.

Revised Laws of Oklahoma, 1910, Section 5156.

Such an endorsement is a condition precedent to the right to levy upon this real estate.

Koehler v. Ball, 2 Kans., 160-173.

The Oklahoma statute was adopted from Kansas and has been continued in force uninterruptedly from the date of its interpretation to the present time in Kansas, and since its adoption from Kansas in Oklahoma.

The Supreme Court of the State, having decided the principal question against the plaintiff, no doubt overlooked the condition of the record in thus reversing and rendering the case as against plaintiff.

There is, perhaps, a serious question as to whether the execution was ever properly or lawfully issued, or whether the judgment upon which the execution issued is not now dead. It seems that of necessity the issues presented must be determined in favor of plaintiff upon the more vital question, and for this reason a discussion of this phase of the controversy is not now deemed necessary.

Respectfully submitted.

S. T. BLEDSOE,
Attorney for Plaintiff in Error.

Number 283

MAY 9 1914
JAMES D. MAHER
CLERK

In the Supreme Court of the United States

October Term, 1913

L. V. MULLEN,

Plaintiff in Error,

vs.

N. H. SIMMONS, SHERIFF, ET AL.,

Defendants in Error.

In Error to the Supreme Court of the State of Oklahoma

REPLY BRIEF OF PLAINTIFF IN ERROR

S. T. Bledsoe and
J. R. Cottingham,
Attorneys for Plaintiff in Error.

Oklahoma Law Brief Co., 719-20-21 Majestic Bldg., Oklahoma City

In the Supreme Court of the United States

October Term, 1913

Number 263

L. V. MULLEN,

Plaintiff in Error,

vs.

N. H. SIMMONS, SHERIFF, ET AL.,

Defendants in Error.

In Error to the Supreme Court of the State of Oklahoma

REPLY BRIEF OF PLAINTIFF IN ERROR

The contentions presented in the brief for appellee render it desirable that this court's attention be called to certain statutes not deemed pertinent or material in the original presentation of the cause. If we correctly interpret

the position taken by counsel for defendant in error in their brief, it is as follows:

1. That the allotment of Frank Bonner became subject to the lien of the judgment of the Hams upon its selection by Bonner, but that it could not be sold until the expiration of restrictions on alienation, which, as to the homestead, would be twenty-one years from the selection of the allotment, and, as to the surplus lands, one, three and five years from date of patent.

2. That such judgment lien constitutes a fixed property right, which was beyond the power of Congress to destroy by the Act of May 27, 1908.

As to the claim of judgment lien.

We will discuss, first, the question of whether a lien actually attached under the statutes in force if the allotment of Bonner had been subject to such a lien; and, second, whether said lands were subject to such lien.

The United States Court for the Southern District of the Indian Territory exercised its jurisdiction and the effect of its judgment, as a lien, is to be determined by Sections 29 to 44 of Chapter 182, 26 Stat. 81, being that part of the Act of May 2, 1890, enlarging and prescribing the jurisdiction of the United States Courts for the Indian Territory. By Section 30 of said Act, Chapter 88 of Mansfield's Digest of the Statutes of Arkansas of 1884, entitled "Judgments

and Decrees," was extended over and put in force in the Indian Territory. The United States District Courts in the several districts of the Indian Territory exercised the jurisdiction and their judgments were given like effect as the judgments of the Circuit Courts of the State of Arkansas. Sections 3917 and 3918 of Mansfield's Digest of the Statutes of Arkansas control the extent and effect of the lien of a judgment upon real estate. These sections are as follows:

> "Sec. 3917. Judgments and decrees rendered in the circuit court shall be a lien on the real estate of the person against whom they are rendered situate in the county for which the court is held (g).
>
> "Sec. 3918. Liens shall commence on the day of the rendition of the judgment and shall continue for three years (h), subject to be revived as hereinafter provided."

The method of reviving a judgment lien which begins on the day of the rendition of the judgment and continues for three years is prescribed in Sections 3921 to 3926, inclusive, of said Mansfield's Digest, which sections are as follows:

> "Sec. 3921. The plaintiff or his legal representative may, at any time before the expiration of the lien on any judgment, sue out a *scire facias* to revive the same.
>
> "Sec. 3922. The *scire facias* shall be served on the defendant or his legal representatives, terre-tenants or other person occupying the land, and may be directed to and served in any county in this state.
>
> "Sec. 3923. If the defendant can not be found, the court shall make an order briefly setting forth the nature of the case, and requiring all persons interested to appear and show cause why such judgment or decree should

not be revived, and the lien continued, on or before the second day of the next term of said court.

"Sec. 3924. A copy of such order shall be put up at the court-house door of the county in which such judgment or decree may have been rendered, four weeks before the commencement of the term of the court at which the parties are required to appear.

"Sec. 3925. If, upon service or publication of the *scire facias* as required in the preceding section, the defendant, or any other person interested, do not appear and show cause why such judgment or decree shall not be revived, the same shall be revived, and the lien continued for another period of three years, and so on from time to time, as often as may be necessary.

"Sec. 3926. If a *scire facias* be sued out before the termination of the lien of any judgment or decree, the lien of the judgment revived shall have relation to the day on which the *scire facias* issued; but if the lien of any judgment or decree shall have expired before suing out the *scire facias*, the judgment of revival shall only be a lien from the time of the rendition of such judgment."

It will be observed from the above quoted sections that a judgment or decree of a United States court in the Indian Territory constituted a lien on the real estate of the person against whom rendered situated in the county in which the court was held, but that such lien commenced on the day of the rendition of the judgment and continued for three years *only*, and, unless revived as provided in the above quoted sections, never again became a lien upon real estate. It will be further noted that, if revived after the expiration of the period for which the lien run, such judgment constitutes a lien only from the time of the revival of the judgment.

The judgment of *Ham* v. *Bonner* was rendered in the United States Court for the Indian Territory, Southern District, on the 31st day of January, 1901, and, under the clear and unequivocable language of the statute, expired, so far as it was possible for it to constitute a lien on real estate, on the 30th day of January, 1904. The allotment of Bonner not having been selected until the 23d day of February, 1906, there is no possible interpretation of this statute under which it could have been held to constitute a lien upon the real estate of Bonner. There was, therefore, not the semblance of a judgment lien upon the lands involved at the time of their selection and allotment. At the date of the admission of Oklahoma as a state, the territorial statute in force prescribing the extent and effect of judgment liens upon real estate was Section 1 of Article 3 of Chapter 28 of the Session Laws of Oklahoma, 1905, found at page 320 and reproduced as Section 5941 of the Compiled Laws of Oklahoma, 1909, and, with slight modification, as Section 5148 of the Revised Laws of 1910. Section 5148 of the Revised Laws of 1910 is as follows:

> "Sec. 5148. Judgments of courts of record of this State, except county courts, and of courts of the United States rendered within this State, shall be liens on the real estate of the debtor within the county in which the judgment is rendered from and after the time the judgment is entered on the judgment docket. An attested copy of the journal entry of any such judgment, together with a statement of the costs taxed against the debtor in the case may be filed in the office of the clerk of the district court of any county, and such judgment shall be

> a lien on the real estate of the debtor within that county from and after the date of filing and entering such judgment on the judgment docket. The clerk shall enter such judgment on the appearance and judgment dockets in the same manner and within the same time after such judgment is filed in his office as if rendered in the court of which he is clerk. Execution shall only be issued from the court in which the judgment is rendered, or in which a transcript of a county court judgment is first filed."

The only departure in this section from the previous statute is that it excludes as liens, judgments of the county court and the courts of the United States, and changes in verbiage to make the territorial statute applicable as a state statute. Sections 5968 of the Compiled Laws, 1909, and Section 5152 of the Revised Laws of Oklahoma, 1910, are identical and are also literal copies of Section 4336 of the Oklahoma statutes of 1893. Being identical, we quote only Section 5152 of the Revised Laws, 1910, as follows:

> "Sec. 5152. All real estate not bound by the lien of the judgment, as well as goods and chattels of the debtor, shall be bound from the time they shall be seized in execution."

Measured by the statutes of Arkansas in force in the Indian Territory prior to Statehood, the judgment under which the defendants claim had lost its capacity to become a lien upon real estate long prior to the selection of the land in allotment by Bonner. Measured by the Oklahoma state statute, if it had been a lien in the county where the judgment is of record, it did not become a lien in the county in which the land is located until an entry of the judgment upon the

judgment record of the district court in the county in which the land is located, which was not done in this case, or until actually seized under an execution, which occurred after the acquisition of the property by the plaintiff, Mullen.

Therefore, assuming that Bonner's title was of a character that could have been subjected to a judgment lien, there is a total absence of the conditions and requirements necessary to fix such a lien upon the land involved.

It certainly, however, was not the purpose of Congress to permit a lien to attach to lands as to which alienation is prohibited, to become effective when the lands are alienable and operate to deprive the allottee of any of the benefit of receiving the lands in allotment.

Choate v. *Trapp*, 224 U. S. 665.
Goat v. *United States*, 224 U. S. 458.
Keel v. *Ingersoll*, 27 Okl. 117, 111 Pac. 214.
Krause v. *Means*, 12 Kan. 335.
Maynes v. *Veale*, 20 Kan. 374.
Farrington v. *Wilson*, 29 Wis. 383.
Landrum v. *Graham*, 22 Okl. 458, 98 Pac. 432.

Nor was it the purpose in the extension of the Oklahoma statutes over that part of the state of Oklahoma which formerly constituted the Indian Territory to reinstate dormant judgment liens. Even if Section 5148 had been literally complied with, that section certainly has reference only to judgments which were existing liens in the county in which the judgment was of record and not to judgments which, by posi-

tive prohibition of law, had ceased to be liens and which could be reinstated as liens only by following a certain procedure. Therefore there is no possible theory upon which a judgment lien could rest.

The execution was issued by the clerk of the District Court of Carter County on the 20th day of September, 1908; received by the sheriff of Johnston County on the 1st day of October, 1908, and levied by him on the 19th day of October, 1908. (Tr. 12) Long prior, therefore, to the possibility of an attaching of an execution lien to the land involved, the Act of May 27, 1908 (Chap. 199, 35 Stats. 312, Bledsoe's Indian Land Laws, Chap. 53) had become effective exempting in unequivocable terms the lands involved from any and all liability of every character arising prior to the removal of restrictions on alienation. The contention, therefore, of defendant in error that the judgment or execution in the case of *Ham* v. *Bonner*, constituted a lien upon the property involved is without any information whatever.

The effect of a statute purporting to fix a lien upon lands held subject to restrictions on alienation under the laws of the United States undoubtedly presents a federal question, the solution of which is for this court. However, the Supreme Court of the state neither considered nor construed either of the statutes. Apparently it was unaware of their existence.

If a lien existed by virtue of a judgment, but subject to existing restrictions upon alienation, Congress clearly had authority to extend or enlarge such restrictions as against such character of lien.

We believe that we have, in the previous part of this brief, demonstrated beyond question that there was no judgment lien in favor of the Hums as against the land involved. If there was such an inchoate lien, however, it certainly did not deprive Congress of the power to extend and enlarge the restrictions on alienation so as to prohibit the enforcement of such lien at the expiration of the existing period of restrictions on alienation. *Tiger* v. *Western Investment Co.*, 221 U. S. 286. This is on the assumption that a lien was possible under the restrictions imposed by the Choctaw-Chickasaw Supplemental Agreement. As heretofore noted, however, we respectfully insist, under a proper interpretation of that agreement, no lien could attach.

It is respectfully submitted that the judgment of the Supreme Court of the State of Oklahoma should be reversed and the judgment of the trial court affirmed.

S. T. Bledsoe & J. R. Cottingham,
Attorneys for Plaintiff in Error.

Oklahoma City, April 25, 1914.

No. 263.

MAR 31 1914
JAMES D. MAHER
CLERK

IN THE

Supreme Court of United States

OCTOBER TERM, 1913.

No. 263.

L. V. MULLEN,

Plaintiff in Error,

vs.

N. H. SIMMONS, Sheriff of Johnston County, Okla., et al.,

Defendants in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

BRIEF FOR DEFENDANTS IN ERROR

J. E. DOLMAN,

L. S. DOLMAN,

Attorneys for Defendants in Error.

IN THE

Supreme Court of United States

OCTOBER TERM, 1913.

No. 203

L. V. MULLEN,

Plaintiff in Error,

vs.

N. H. SIMMONS, Sheriff of Johnston County, Okla., et al.,

Defendants in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

BRIEF FOR DEFENDANTS IN ERROR

J. E. DOLMAN,
L. S. DOLMAN,
Attorneys for Defendants in Error.

STATEMENT.

Defendants in error will follow the plaintiff in error in manner as outlined in the brief of plaintiff in error.

The action of plaintiff Mullen was commenced November 26, 1908, instead of May 26, 1908, as set out in plaintiff's brief.

Only two issues were framed by the pleadings; the first being that the judgment was barred by limitation under the statutes of the state, and the second, that the lands were exempt from seizure and sale under the laws of Congress.

The statement of the case in plaintiff's brief appears sufficient to properly present these two questions.

Both questions were determined adversely to plaintiff by the Supreme Court of the state.

ARGUMENT

Three questions are really presented by the brief of plaintiff in error, viz:

1st. That under the laws of congress known as the Choctaw-Chickasaw allotment agreement (Chap. 517, 30 Stat. 495-505), and the supplemental agreement (Chap. 1362, 32 Stat. 641), the allotment of Bonner was exempt from the lien of the interpleaders judgment.

2nd. That under the laws of Oklahoma said judgment never became a lien on said allotment.

3rd. That if such judgment did become a lien on said allotment, it was destroyed and wiped out by the Act of May 27th, 1908 (Chap. 199, 35 Stat. 31).

Taking these questions up in their order:

First:

It is objected the Supreme Court of Oklahoma did not give

affect to the words in Section 15 of the Act referred to as follows: "Nor shall said lands be sold except as herein provided." What goes before refers as clearly as the English language can express it, to any contractual obligation made prior to the time a voluntary conveyance could under the act be made, and exempts the land from any charge by reason of such obligation or contract, and then proceeds to state just as clearly that the land shall not be voluntarily sold except at the time and in the manner prescribed in the Act. The entire section refers exclusively to voluntary deeds, debts and contractual obligations, and has no reference whatever to a judgment for damages for a tort.

The decision of the Supreme Court of Oklahoma (record 25) is manifestly right in placing this construction upon the statute in question.

Brun et al vs. Mann, 151 Fed. 145, and cases cited.

It is the intention expressed in the statute and that alone to which the courts may lawfully give effect: the act must be held to mean what it clearly expresses.

Wabash vs. United States, 178 Fed. 5-12.
United States vs. Ninety-Nine Diamonds, 130 Fed. 961-964.
United States vs. Alamogordo Lumber Co., 202 Fed. 700-706.

There is nothing in the case of Mullen vs. United States, 224 U. S. 448, cited by counsel for plaintiff in error, which construes or attempts to construe or even mentions a construction of Section 15 of the Act in question as stated by counsel for plaintiff in error on page 20 of his brief. The construction of that section of the statute was not an issue in the case and in no wise touched upon or

decided by the court.

Second:

If we are correct in our construction of Section 15 of the Act referred to, then under the laws of Oklahoma as construed by the highest court of that state, in its decision in this case, the judgment of the interpleader became a lien on the allotment to Bonner when he acquired the same on the 23rd day of January, 1906, and this court is bound by that decision as to the validity and construction of its lien statute under the pleadings in this case.

United States vs. Morrison, 4 Pet. 124.
Massingill vs. Downs, 7 How. 760.
Taylor vs. Thomson, 5 Pet. 358.
Bank of U. S. vs. Longworth, Fed. cases No. 923.
United States vs. Eisenbeis, 88 Fed. 4.
Fidelity Insurance Co. vs. Shenandoah Iron Co., 42 Fed. 372.
Re Grissler, 136 Fed. 754.
The Winnebago, 141 Fed. 945, *certiorari* denies 200 U. S. 616.
Morgan vs. First National Bank, 145 Fed. 466.
Geo. A. Shaw & Co. vs. Cleveland, etc., Ry. Co., 173 Fed. 746.
Livingston vs. Moore, 7 Pet. 469.
Galpin vs. Page, 18 Wall 350.

Third.

The lien of the interpleaders judgment having legally attached to the allotment of Bonner, it became a vested right of property of which the interpleader could not be deprived by any subsequent act of congress, without violating the Fifth Amendment to the Constitution of the United States.

When the land in question was allotted to Bonner, he became

the absolute owner thereof, which in the absence of restrictions he could convey.

Mullen vs. United States, 224 U. S. 448-457, and cases cited, so that when the restrictions were removed by the Act of May 27th, 1908, the owner of the judgment had the right to have his lien enforced and the land sold to satisfy the same.

The various acts of congress affecting the lands allotted to the members of the Choctaw and Chickasaw Indians are sufficiently outlined in plaintiff's brief.

The act under which the lands were allotted is known as the "Supplemental Agreement," and is set out on pages 13 to 15 of plaintiff's brief. Section 12 provides that the lands allotted as a homestead shall be inalienable for twenty-one years from date of certificate. While this section would prevent a sale, it would not of necessity prohibit a lien. Section 15 would prohibit a sale and prohibit an incumbrance under any contract of the allottee. This section would not prohibit a lien attaching for a tort of the allottee.

These were all the sections of law in force on February 23, 1906, when Bonner acquired title to these lands, and if such lien in fact attached, even though at the time no right of sale was inherent under the judgment, it would be such a property right as could not be destroyed by subsequent legislation. This right of sale under the lien might have been withheld until the title passed out of the allottee, but the lien could not have been displaced entirely.

The proviso in section 4 of the act of May 27, 1908, was not intended to reach any vested property right except those prohibited by previous laws, nor was it intended to reach other than personal claims or demands which prior to the passage of that act were non-enforceable against the land. Certainly it could not be said to affect a levy and sale under a lien after the title had passed out of

the allottee. While proceedings had been commenced to sell the land under the lien, of which plaintiff had due notice, no levy had been made for that purpose until two days after the allottee Bonner had parted with such title as he had to plaintiff.

Respectfully submitted.

J. E. DOLMAN,

L. S. DOLMAN,

Attorneys for Defendants in Error.

MULLEN *v.* SIMMONS, SHERIFF OF JOHNSTON COUNTY.

ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

No. 263. Submitted May 11, 1914.—Decided June 8, 1914.

The policy of Congress in regard to restrictions upon alienation of allotments has been to protect Indians against their own improvidence, whether shown by acts of commission or omission, contracts or torts.

The prohibition, contained in § 15 of the act of July 1, 1902, as to affecting or encumbering allotments made under the act by deeds, debts or obligations contracted prior to the termination of period of restriction on alienation, applies to a judgment entered against an allottee, whether based on a tort or on a contract.

A tort may be a breach of a mere legal duty or a consequence of negligent conduct, and a confessed judgment based on a prearranged tort might become an easy means of circumventing the policy of the statutes restricting alienation of Indian allotments if alienation could be effected by levy and sale under such a judgment.

33 Oklahoma, 184, reversed.

THE facts, which involve the construction of the provisions of the act of July 1, 1902, affecting alienation of

allottee lands, and the effect of judgments against the allottee, are stated in the opinion.

Mr. S. T. Bledsoe and *Mr. J. R. Cottingham* for plaintiff in error:

The lands involved were not subject to seizure and sale on execution. *Hamilton* v. *Brown*, 31 Oklahoma, 213; *S. C.*, 120 Pac. Rep. 950; *Holden* v. *Garrett*, 23 Kansas, 98; *Koheler* v. *Ball*, 2 Kansas, 160; *Mullen* v. *United States*, 224 U. S. 448.

It was not the purpose of Congress to permit a lien to attach to lands as to which alienation is prohibited, to become effective when the lands are alienable and operate to deprive the allottee of any of the benefit of receiving the lands in allotment. *Choate* v. *Trapp*, 224 U. S. 665; *Goat* v. *United States*, 224 U. S. 458; *Keel* v. *Ingersoll*, 27 Oklahoma, 117; *S. C.*, 111 Pac. Rep. 214; *Krause* v. *Means*, 12 Kansas, 335; *Maynes* v. *Veale*, 20 Kansas, 374; *Farrington* v. *Wilson*, 29 Wisconsin, 383; *Landrum* v. *Graham*, 22 Oklahoma, 458; *S. C.*, 98 Pac. Rep. 432.

Nor was it the purpose in the extension of the Oklahoma statutes over that part of Oklahoma which formerly constituted the Indian Territory to reinstate dormant judgment liens. Chapter 199, 35 Stat. 312; Bledsoe's Indian Land Laws, c. 53.

The effect of a statute purporting to fix a lien upon lands held subject to restrictions on alienation under the laws of the United States undoubtedly presents a Federal question.

If a lien existed by virtue of a judgment, but subject to existing restrictions upon alienation, Congress clearly had authority to extend or enlarge such restrictions as against such character of lien. *Tiger* v. *Western Investment Co.*, 221 U. S. 286.

Mr. John E. Dolman and *Mr. L. S. Dolman* for defendants in error:

The Oklahoma courts gave full effect to the words in § 15 of the act of 1902 providing that the lands should not be sold except as therein provided. That entire section refers exclusively to voluntary deeds, debts and contractual obligations, and has no reference whatever to a judgment for damages for a tort. *Brun* v. *Mann*, 151 Fed. Rep. 145.

It is the intention expressed in the statute and that alone to which the courts may lawfully give effect; the act must be held to mean what it clearly expresses. *Wabash* v. *United States*, 178 Fed. Rep. 5, 12; *United States* v. *Ninety-Nine Diamonds*, 139 Fed. Rep. 961; *United States* v. *Alamogordo Co.*, 202 Fed. Rep. 700, 706. *Mullen* v. *United States*, 224 U. S. 448, does not apply.

Under § 15 of the act of 1902, and under the laws of Oklahoma as construed by the highest court of that State in its decision in this case, the judgment of the interpleader became a lien on the allotment when the allottee acquired the same, and this court is bound by the decision of the state court as to the validity and construction of its lien statute under the pleadings in this case. *United States* v. *Morrison*, 4 Pet. 124; *Massingill* v. *Downs*, 7 How. 760; *Taylor* v. *Thomson*, 5 Pet. 358; *Bank* v. *Longworth*, Fed. Cas. No. 923; *United States* v. *Eisenbeis*, 88 Fed. Rep. 4; *Fidelity Ins. Co.* v. *Shenandoah Iron Co.*, 42 Fed. Rep. 372; *Re Grissler*, 136 Fed. Rep. 754; *The Winnebago*, 141 Fed. Rep. 945; *S. C.*, 200 U. S. 616; *Morgan* v. *First National Bank*, 145 Fed. Rep. 466; *Geo. A. Shaw & Co.* v. *Cleveland Ry. Co.*, 173 Fed. Rep. 746; *Livingston* v. *Moore*, 7 Pet. 469; *Galpin* v. *Page*, 18 Wall. 350.

The lien of the interpleader's judgment having legally attached to the allotment, it became a vested right of property of which the interpleader could not be deprived by any subsequent act of Congress, without violating the Fifth Amendment. *Mullen* v. *United States*, 224 U. S. 448, 457.

MR. JUSTICE MCKENNA delivered the opinion of the court.

Plaintiff in error brought suit in the District Court in and for the Seventh Judicial District, Johnston County, State of Oklahoma, to restrain defendant in error, who was defendant in the trial court, from selling under execution issued upon a judgment obtained against one F. A. Bonner certain lands, which are described, belonging to plaintiff in error. He was plaintiff in the action, and we will so refer to him. Plaintiff, it is alleged, derived his title from F. A. Bonner by warranty deed dated October 17, 1908, Bonner then having unrestricted right to sell. Bonner is a member and citizen of the Choctaw Tribe of Indians, of one-sixteenth degree of Indian blood, and that the lands described constitute his allotment as a member and citizen of such tribe; that the judgment upon which the execution was issued was rendered and the debt evidenced by it contracted more than five years prior to the issuance of the execution and at a time when the lands were inalienable, and that under the laws of the United States and the treaties between the Chickasaw and Choctaw Nations and the United States the lands were exempt from the operation of the judgment. That defendant threatens to sell the lands and that a sale thereof and the deed which may be executed will cast a cloud upon plaintiff's title. A restraining order was issued. Defendant in his answer alleged that when the restraining order was served upon him he was in possession of the lands under the execution which he set up as a defense. He admitted the other allegations of the plaintiff and alleged that E. F. Ham et al., plaintiffs in the judgment, were necessary parties. He prayed a dissolution of the restraining order and that the suit be dismissed.

Subsequently Millord F. Ham and others filed "their interplea in said cause" and asked to be made defendants.

For answer to plaintiff's petition they alleged the following: They recovered the judgment in controversy against Frank Bonner for the sum of $2,966.66^2/_3$ on January 31, 1901, as damages for the killing of the husband of one of the interpleaders and the father of the others, upon which executions were issued but all returned unsatisfied, and finally on September 29, 1908, the interpleaders caused the execution in controversy to be issued and levied upon the lands described in plaintiff's petition. On February 23, 1906, Bonner became the owner of the lands by allotment of the same as an Indian and the judgment thereupon became a lien upon the lands. Subsequently that part of the Indian Territory and the Southern District where the lands are located became a part of what is now Johnston County, and the judgment is still a lien upon the lands and was a lien at the time of the purchase by Mullen who, at the time of the alleged conveyance to him, had full knowledge and notice of the judgment and knew that an execution had been issued and levied upon the lands and that, therefore, he is not an innocent purchaser of them but took them subject to the judgment.

Mullen demurred to the answer of Simmons and to that of the interpleaders upon the grounds (1) that they did not constitute a defense. (2) They failed to show that the execution was a lien upon the lands, failed to show that the lands were seized by the sheriff prior to the deed to plaintiff, and failed to show that a lien attached by virtue of the execution. (3) The lands, having been taken in allotment by Bonner, were not subject under the law to any debt, deed, contract or obligation of any character made prior to the time at which the lands could be alienated by the allottee; that the judgment was recovered against him more than five years before the lands were alienable and that the lands were not subject to it or to the execution issued upon it.

The judgment of the court was that it "doth overrule

plaintiff's general demurrer and his first special demurrer . . . and doth sustain plaintiff's second special demurrer . . . and the interpleaders and the defendants elect to stand upon their answer and interplea herein, refuse to plead further and the court finds for the plaintiff and that he is entitled to the relief prayed for in his petition. . . ." And it was adjudged that the defendant Simmons, as sheriff of Johnston County, and his deputies, and the interpleaders be enjoined and restrained forever from issuing or causing to be issued any execution or other process upon the judgment rendered against Frank Bonner in favor of the interpleaders, and from levying the same upon the lands described.

The Supreme Court of the State reversed the judgment, deciding "that the lien of interpleader's judgment attached to the allotment as soon as it came into being; that plaintiff took the land subject thereto, and that the same should be enforced and said land sold to satisfy the same, and that, too, notwithstanding the provisions of the 15th section of the act of July 1, 1902, which has no material bearing on the question." 33 Oklahoma, 184, 188.

The section referred to is as follows: "Lands allotted to members and freedmen shall not be affected or encumbered by any deed, debt or obligation of any character contracted prior to the time at which said land may be alienated under this Act, nor shall said lands be sold except as herein provided." c. 1362, 32 Stat. 641, 642.

The Supreme Court of Oklahoma in deciding that this provision did not apply distinguished between the obligations resulting from an Indian's wrongful conduct and the obligations resulting from his contracts, saying, p. 187, "A judgment in damages for tort is not a 'debt contracted'" within the contemplation of § 15. In other words, the court was of the view that the tort retained its identity, though merged in the judgment. However, we need not enter into the controversy of the cases and the

books as to whether a judgment is a contract. Passing such considerations, and regarding the policy of § 15 and its language, we are unable to concur with the Supreme Court of Oklahoma.

This court said, in *Starr* v. *Long Jim*, 227 U. S. 613, 625, that the title to lands allotted to Indians was "retained by the United States for reasons of public policy, and in order to protect the Indians against their own improvidence." It was held, applying the principle, that a warranty deed made by Long Jim at a time when he did not have the power of alienation "was in the very teeth of the policy of the law, and could not operate as a conveyance, either by its primary force or by way of estoppel" after he had received a patent for the land.

The principle was applied again in *Franklin* v. *Lynch*, 233 U. S. 269, and its strict character enforced against the deed of a white woman who acquired title in an Indian right. It is true, in these cases the act of the Indian was voluntary or contractual, and, it is contended, a different effect can be ascribed to the wrongs done by an Indian and that in reparation or retribution of them the state law may subject his inalienable lands—inalienable by the National law—to alienation. The consequence of the contention repels its acceptance. Torts are of variable degree. In the present case that counted on reached, perhaps, the degree of a crime, but a tort may be a breach of a mere legal duty, a consequence of negligent conduct. The policy of the law is, as we have said, to protect the Indians against their improvidence, and improvidence may affect all of their acts, those of commission and omission, contracts and torts. And we think § 15 of the act of July 1, 1902, was purposely made broadly protective, broadly preclusive of alienation by any conduct of the Indian, and not only its policy but its language distinguishes it from the statute passed on in *Brun* v. *Mann*, 151 Fed. Rep. 145. Its language is that "lands allotted . . .

shall not be *affected* or encumbered by any deed, debt or *obligation* of any *character contracted* prior to the time at which" the lands may be alienated, "nor shall said lands be sold except" as in the act provided. The prohibition then is that the lands shall not be "affected . . . by any obligation of any character," and, as we have seen, an obligation may arise from a tort as well as from a contract, from a breach of duty or the violation of a right. *Exchange Bank* v. *Ford*, 7 Colorado, 314, 316. If this were not so, a prearranged tort and a judgment confessed would become an easy means of circumventing the policy of the law.

Judgment reversed and case remanded for further proceedings not inconsistent with this opinion.

MR. JUSTICE DAY dissents.